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No. 78-579

In the Supreme Court of the United States

October Term, 1978

Henry S. Reuss, Petitioner

v.

John J. Balles, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

Opinions below ---------- 1
Jurisdiction ---------- 2
Compliance with 28 U.S.C. §2403 ---------- 2
The questions presented ---------- 2
Constitutional and statutory provisions ------- 3
Statement ---------- 9
Reasons for granting the petition ---------- 17
Conclusion ---------- 21
Appendix A ---------- 1A
Appendix B ---------- 29A
Appendix C ---------- 31A

CITATIONS

Cases:

Buckley v. Valeo, 424 U.S. 1 ---------- 11

Federal Open Market Committee v. Merrill, No. 77-1378 (order allowing certiorari filed May 22, 1978) ---------- 9, 10, 14

Glidden v. Zdanok, 360 U.S. 530 (1962)---- 18

Raichle v. Federal Reserve Bank, 34 F.2d 910 (2d Cir. 1929) ---------- 16

Palmore v. United States, 411 U.S. 389 (1973) ---------- 18

Constitution, statutes and rule:

The Constitution, Article I, Section 8 --- 13

Federal Reserve Act, Section 12A (12 U.S.C. 263) ---------- 9, 13

Federal Reserve Act, Section 25(b), (12 U.S.C. 632) ---------- 12

28 U.S.C. §1331 ---------- 12

28 U.S.C. §1337 ---------- 12

28 U.S.C. §2282 ---------- 21

Fed. R. Civ. P. 36(a) ---------- 20

Miscellaneous:
Solicitor General's Petition for Certorari in *Federal Open Market Committee v. Merrill*, No. 77-1387 ---------- 9
Solicitor General's brief in *Federal Open Market Committee v. Merrill*, No. 77-1387 ---------- 16
Appendix filed in *Federal Open Market Committee v. Merrill*, No. 77-1387 -- 10, 14
Burns, *The Importance of an Independent Central Bank*, 63 Federal Reserve Bulletin 777 (Sep.1977) ---------- 10
Wall Street Journal, p. 36, Col. 2, Sep. 27, 1978 ---------- 13

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The Honorable Henry S. Reuss, a Member of the United States House of Representatives, respectfully petitions by his attorney for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1A-27A) is not yet reported. The opinion of the district court (App. C, *infra*, pp. 31A-45A) is reported at 73 F.R.D. 90.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 29A-30A) was entered on July 7, 1978. On July 21, 1978, the petitioner filed a timely petition for rehearing, which was denied by order entered on August 14, 1978. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1)).

COMPLIANCE WITH 28 U.S.C. §2403

By letter dated June 24, 1976, from the Honorable Barrington D. Parker to the Honorable Edward H. Levi, the United States District Court for the District of Columbia certified to the Attorney General pursuant to 28 U.S.C. §2403 the fact that the constitutionality of an Act of Congress was drawn into question.

THE QUESTIONS PRESENTED

1. Does a Member of the House of Representatives have standing to sue to enjoin individuals from serving as de facto officers of the United States where the Member makes a substantial claim that such individuals acquire their offices by a facially unconstitutional process which makes them jurisdictionally immune to the power of impeachment vested in the House of Representatives?

2. Where a plaintiff claims that he has specific, concrete interests at stake in the actions of certain officers of the United States, and seeks to enjoin such officers from acting on the ground of a fundamental constitutional infirmity in their appointment, must he be denied standing if his complaint fails to show that such officers would act more favorably toward him if they had been appointed in accordance with the requirements of the Constitution?

3. Where the issue of the nature of the interests which the plaintiff has at stake in the decisions of the Federal Open Market Committee is crucial to the determination of his standing to challenge the constitutionality of the appointment of certain members

of that Committee, may this issue be resolved against him on the basis of wholly unsupported factual assertions by defendants' counsel, with no opportunity to subject such assertions to probative procedures?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Constitution of the United States, in pertinent part, provides as follows:

ARTICLE I.

* * * * *

SECTION 2. * * * * *

The House of Representatives * * * shall have the sole Power of Impeachment.

* * * * *

ARTICLE II.

* * * * *

SECTION 2. * * * * *

He [the President] ... shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

* * * * *

SECTION 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

* * * * *

2. The Federal Reserve Act, in pertinent part, provides as follows:

SECTION 4. FEDERAL RESERVE BANKS

* * * * *

[12 U.S.C. §341]

Upon the filing of such certificate with the Comptroller of the Currency as aforesaid, the said Federal reserve bank shall become a body corporate and as such, and in the name designated in such organization certificate, shall have power—

* * * * *

Fifth. To appoint by its board of directors a president, vice presidents, and such officers and employees as are not otherwise provided for in this Act, to define their duties, require bonds for them and fix the penalty thereof, and to dismiss at pleasure such officers or employees. The president shall be the chief executive officer of the bank and shall be appointed by the board of directors, with the approval of the Board of Governors of the Federal Reserve System, for a term of five years; and all other executive officers and all employees of the bank shall be directly responsible to him. The first vice president of the bank shall be appointed in the same manner and for the same term as the president, and shall, in the absence or disability of the president or during a vacancy in the office of the president, serve as chief executive officer of the bank. Whenever a

vacancy shall occur in the office of the president or the first vice president, it shall be filled in the manner provided for original appointments; and the person appointed shall hold office until the expiration of the term of his predecessor.

* * * * *

[12 U.S.C. §301]

Every Federal reserve bank shall be conducted under the supervision and control of a board of directors.

* * * * *

[12 U.S.C. §302]

Such board of directors shall be selected as hereinafter specified and shall consist of nine members, holding office for three years, and divided into three classes, designated as classes A, B, and C.[1]

* * * * *

SECTION 12A. FEDERAL OPEN MARKET COMMITTEE

[12 U.S.C. §263]

(a) There is hereby created a Federal Open Market Committee (hereinafter referred to as the "Committee") which shall consist of the members of the Board of Governors of the Federal Reserve System and five representatives of the Federal Reserve banks to be selected as hereinafter provided. Such representatives shall be presidents or first vice

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1. The lengthy and detailed provisions of section 4 of the Federal Reserve Act (12 U.S.C. §§301-305) for the election of directors are omitted. Beyond the undisputed fact that they provide for the election of Class A and B directors by the member commercial banks, and Class C directors by the Federal Reserve Board, such provisions are not relevant to the issues presented by this petition.

presidents of Federal Reserve banks and, beginning with the election for the term commencing March 1, 1943, shall be elected annually as follows: One by the board of directors of the Federal Reserve Bank of New York, one by the boards of directors of the Federal Reserve Banks of Boston, Philadelphia, and Richmond, one by the boards of directors of the Federal Reserve Banks of Cleveland and Chicago, one by the boards of directors of the Federal Reserve Banks of Atlanta, Dallas, and St. Louis, and one by the boards of directors of the Federal Reserve Banks of Minneapolis, Kansas City, and San Francisco. In such elections each board of directors shall have one vote; and the details of such elections may be governed by regulations prescribed by the Committee, which may be amended from time to time. An alternate to serve in the absence of each such representative shall likewise be a president or first vice president of a Federal Reserve bank and shall be elected annually in the same manner. The meetings of said Committee shall be held at Washington, District of Columbia, at least four times each year upon the call of the chairman of the Board of Governors of the Federal Reserve System or at the request of any three members of the Committee.

(b) No Federal Reserve bank shall engage or decline to engage in open-market operations under section 14 of this Act except in accordance with the direction of and regulations adopted by the Committee. The Committee shall consider, adopt, and transmit to the several Federal Reserve banks, regulations relating to the open-market transactions of such banks.

(c) The time, character, and volume of all purchases and sales of paper described in section 14 of this Act as eligible for open-market operations shall be governed with a view to accommodating commerce and business and with regard to their bearing upon the general credit situation of the country.

3. Section 2282 of Title 28, United States Code, as in effect with respect to this action, provides as set forth below. Section 2 of Public Law 94-381 repealed §2282 and section 3 amended §2284, but section 7 provides that the Act does not apply to any action commenced on or before August 12, 1976. This action was commenced on June 21, 1976.

§2282. Injunction against enforcement of Federal statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

STATEMENT

The Federal Open Market Committee of the Federal Reserve System (hereinafter "the Committee" or the "FOMC"), which is composed of the members of the Board of Governors of the Federal Reserve System and five representatives of the Federal Reserve banks, has the responsibility under the Federal Reserve Act for directing the operations of the Federal Reserve banks in the open market. Section 12A, as added, 48 Stat. 168, and amended, 12 U.S.C. §263. The Committee authorizes and directs Federal Reserve Bank purchases and sales of government securities and certain other securities in the domestic securities market. These operations are conducted through a combined investment pool, called the System Open Market Account, by the Account Manager in New York, under guidelines and instructions from the Committee.[2]

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2. This paragraph is substantially identical to the opening paragraph of the statement of the Solicitor General in his petition for certiorari in Federal Open Market Committee v. Merrill, No. 77-1387, hereinafter referred to as "Merrill".

These open market operations control the supply of money in the domestic economy.[3] Their immediate or initial effect is felt in the credit markets in the form of changes in prevailing interest rates.[4] Their deferred, or long-range effect is manifested in the rate of inflation, which is the change in the general price level over a period of time.[5]

Both of these effects have an inescapable impact on the bondholder. Even when he is not confronted with an immediate necessity to reinvest the proceeds of maturing bonds, changes in prevailing interest rates necessarily change the market value of his bonds, with the magnitude of such change increasing the longer the

3. Affidavit of Holland, paragraphs 4, 5, Merrill Appendix 46, 47; Affidavit of Holland, paragraph 5, Merrill Appendix 77, 78.

4. Affidavit of Holland, paragraph 6, Merrill Appendix 47; Affidavit of Holland, paragraph 6, Merrill Appendix 78.

5. An August 1977 speech by Arthur F. Burns, then Chairman of the Federal Open Market Committee, states the matter thus: "Neither I nor, I believe, any of my associates would quarrel with the proposition that money creation and inflation are closely linked and that serious inflation could not long proceed without monetary nourishment. We well know—as do many others—that if the Federal Reserve stopped creating new money, or if this activity were slowed drastically, inflation would soon either come to an end or be substantially checked." 63 Federal Reserve Bulletin 778, September 1977.

See, also, Points and Authorities in Opposition to Defendants' Motion to Dismiss, Court of Appeals Appendix 104-110 (hereinafter "C.A. App.", a copy of which has been lodged with the clerk of this court.)

bond has to run to maturity. While the cirumstances of a particular bondholder may permit him, for the time being, to ignore these shortrun effects, there is no way that he can ultimately escape the loss due to a deterioration in the purchasing power of the dollar. In this respect, his situation is sharply different from that of most other participants in the economy. When the currency is depreciated, the wage earner can demand higher wages, the vendor can charge higher prices, and the landlord can raise the rent, but the bondholder must accept the face amount of his bond in full settlement of the obligation, no matter how small a fraction of its issue price in real economic terms its value at maturity may represent. The bondholder who attempts to escape the FOMC's control of maturity value by selling prior to maturity finds his selling price effectively set by the FOMC's control of interest rates. For the bondholder there is, quite literally, no escape from the FOMC.

Petitioner commenced this litigation in June 1976 in the United States District Court for the District of Columbia Circuit. The defendants were the five members of the FOMC elected by the boards of directors of the Federal Reserve banks, the five alternate members so elected, and the twelve banks (Complaint, C.A. App. 4, 6, 8). The petitioner contended that the members of the Committee clearly meet the functional test for officers of the United States enunciated by this Court in *Buckley v. Valeo*, 424 U.S. 1. He sought to

enjoin the elected representatives of the Federal Reserve banks, who obviously are not appointed in accordance with the constitutional requirements for officers of the United States, from further service as voting members of the Committee (C.A. App. 14). His complaint asserted that such service injured him by diminishing and usurping his legislative functions as a Member of Congress (C.A. App. 11, 12). The complaint asserted a further injury by reason of the exercise of governmental power by these defendants over specific, concrete interests of the plaintiff as a bondholder (C.A. App. 12, 13).

The district court had jurisdiction of the action (1) under 28 U.S.C. §1337, because it arose under an act regulating commerce, section 12A of the Federal Reserve Act (12 U.S.C. §263); (2) under section 25(b) of the Federal Reserve Act (12 U.S.C. §632) because a Federal Reserve bank was made a party to the action; and (3) under 28 U.S.C. §1331, founded on the existence of a Federal question and amount in controversy.

The claims of injury were spelled out in detail in the plaintiff's points and authorities in opposition to the defendants' motion to dismiss for lack of standing (C.A. App. 73-117). The principal injuries he claimed as a legislator were, first, that his power to initiate impeachment was impaired because de facto officers are jurisdictionally beyond the reach of that power (C.A. App. 97-99), and second, that where powers conferred by

Article I, section 8 on Congress are exercised pursuant to an invalid legislative delegation, such an exercise usurps powers which still belong to Congress, and thereby injures its Members in their capacity as such (C.A. App. 99-102).[6]

There is nothing frivolous about the plaintiff's claim that the defendants are beyond the reach of his impeachment power. The private character of their offices is evidenced by a number of factors. Their salaries, which now range up to $110,000,[7] are subject to no statutory limitation and are not even paid from appropriated funds. Although their appointments as bank officers by their various boards of directors are subject to approval of the Board of Governors, those appointments merely make them members of a class of 24 persons eligible for election to the five Reserve bank seats on the Committee. Federal Reserve Act, Section 12A (12 U.S.C. §263). No officer of the United States has any power of approval over either their election or their conduct as members of the Committee (Complaint, ¶27, C.A. App. 11).

The district court held that in order to have standing under the impeachment theory, the plaintiff would have

6. As the court of appeals noted, infra, pp. 12A, 13A, this theory is open to the objection that if the relief sought were granted, the powers in question would revert not to Congress but to the seven members of the FOMC serving under valid appointments. For that reason, the issue of injury to the plaintiff's Article I, section 8 powers is not presented by this petition.

7. Wall Street Journal, page 36, column 2, September 27, 1978.

to make "allegations of wrongdoing," —presumably, a statement as to what he, as a Member, would expect to offer in the House of Representatives as his grounds for impeachment (*infra*, p. 44A). Expressly declining to approve or disapprove this reasoning, the court of appeals affirmed the result on the ground that "there is nothing to suggest that he cannot now introduce a bill of impeachment," although the court itself described in a footnote the plaintiff's theory of jurisdictional immunity which would make such a bill an empty gesture even if it were not stricken on a point of order (*infra*, pp. 14A, 15A, note 21).

As to the petitioner's standing as a bondholder, throughout this litigation the defendants have urged, and the courts below have adopted, a theory of open market operations which is inconsistent with that presented by the Government in *Federal Open Market Committee* v. *Merrill* (No. 77-1387, hereinafter "*Merrill*"). The essential thrust of the Government's case in *Merrill* is, first, that the Committee can and does control interest rates by setting a specific range within which the Federal funds rate is to be held, and second, that disclosure of this range would tend to interfere with the control thus exercised.

The affidavits of Holland and Axilrod (*Merrill* Appendix pp. 45, 52, 75) make clear that the FOMC regards its ability to control the Federal funds rate as highly important, and Holland states (*id.* at 78),

"6. The Federal funds rate is a key market interest rate. * * * Historically, a close relationship can be shown between fluctuations in the Federal funds rate and fluctuations in other key market interest rates.* * *"

In the case at bar, by contrast, the defendants have steadfastly urged a totally obsolete theory of open market operations under which Federal Reserve banks are just another competitor, albeit it a large and important one, in the financial markets. Under this theory, as explicitly stated by Judge Hand at the conclusion of his description of open market operations quoted and relied upon by the court of appeals (*infra*, p. 4A), the sale of securities in open market operations does not even lessen the total amount of credit available. *A fortiori*, under this theory, such sales would not reduce the money supply.

In the district court, the defendants not only denied that the FOMC in fact sets interest rates: they even disclaimed authority on the part of the FOMC to do so. Footnote 32 on page 26 of the Points and Authorities in support of Defendants' Motion to Dismiss reads as follows (C.A. App. 60):

> 32. Paragraph 29 of the Amended Complaint is clearly erroneous in alleging that the FOMC votes "to increase prevailing interest rates" or "to decrease prevailing interest rates." The FOMC is not authorized by statute to do so.

In the final analysis, the FOMC argues in *Merrill* that the holders of marketable fixed-amount securities

have such a direct pecuniary interest in the FOMC's decisions that such decisions must be kept secret until after they are fully executed (Brief of the Solicitor General in No. 77-1387); whereas in the case at bar, certain members of the FOMC argue that just such a holder of marketable fixed-amount securities has no standing to question their appointment, because he has no concrete interest in the decisions that they make.

The contrast with the form of presentation in *Merrill* is just as glaring as the contrast with the substance. In *Merrill*, the Government supports its claim that the FOMC controls interest rates by affidavits of distinguished economists, Government officials, and a member of the FOMC itself. In the case at bar, the defendants' contrary claims are supported by nothing more than arguments of counsel and the description of open market operations contained in *Raichle v. Federal Reserve Bank*, 34 F.2d 910 (2d Cir. 1929), a case decided when, under a fully operational gold standard, the entire money system of the United States was radically different from what it is today. (For the petitioner's explanation of the difference between the gold standard and the present system, see C.A. App. 103-110).

Accepting at face value the wholly unsupported factual assertions of the defendants' attorneys as to the function of open market operations, the district court granted a protective order against the plaintiff's effort to probe those assertions through a request for

admissions,[8] and then went on to hold, "Because of the many factors which influence monetary conditions, including open market operations, his allegation that the value of his securities holdings is affected by the Committee's actions is uncertain and tenuous." (*infra*, p. 44A). The court of appeals upheld this rationale, and further held that even if the plaintiff could show that the Committee controlled the value of his bonds, he would also have to show that if the challenged members of the Committee had been appointed in accordance with the Constitution, they would act more favorably in respect of his economic interests than members elected by the Reserve banks.

REASONS FOR GRANTING THE PETITION

We respectfully submit that the decision of the court of appeals radically abrogates the concept of constitutional rights as traditionally understood. At the deepest level of analysis, the same error appears with respect to the plaintiff's injury as a legislator as with respect to his injury as a bondholder. The court holds that a showing of consequential damages must be made before any invasion of a constitutional right or interest can be recognized as an injury. It holds that while a bondholder may have a theoretical right to have constitutionally appointed officers make the governmen-

8. See note 10, infra.

tal decisions determining the value of his bonds, the denial of that right, in and of itself, is not an injury. Similarly, the Member of the House must submit to judicial examination the question of how he proposes to use his power to initiate impeachment, or else forfeit judicial protection. The conflict of the decision with the holdings of this court in *Buckley*, *Palmore*, and *Glidden*[9] has been fully documented in Chief Judge Wright's dissent (*infra*, pp. 23A-27A) and need not be reiterated here. Its potential for mischief is incalculable. It confuses the issue of whether a constitutional right has been impaired with the question of what the plaintiff will do if the impairment is remedied. Most especially when the latter question involves the exercise of a Federal legislator's powers, we respectfully submit that it is not a proper subject for judicial inquiry.

It is self-evident that the impeachment power in relation to the management of the monetary system is of special significance to the chairman of the banking committee of the House of Representatives, and that this power is seriously diluted when it is impaired with respect to five out of the twelve members of the most powerful monetary policymaking body in the country.

For the purposes of the case at bar, it is unnecessary to resolve the question of whether a de facto public

9. Glidden v. Zdanok, 360 U.S. 530 (1962); Palmore v. United States, 411 U.S. 389 (1973); Buckley v. Valeo, 424 U.S. 1 (1976).

officer can be impeached. It is enough, we believe, to show that there is sufficient doubt about the matter to constitute a substantial impairment of the power. The defendants are the guardians of the integrity of the currency of the nation. Apart from the presidency itself, there is no office in the land as to which the preservation of the power of impeachment is a matter of greater moment.

Finally, we respectfully submit that the procedural management of this case by the courts below "has so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this court's power of supervision."

The most important basis for the petitioner's claim to bondholder standing is his contention that the FOMC's decisions determine how much value, if any at all, his bonds will have when they mature. The next most important basis is his contention that the FOMC's control of interest rates controls their market value prior to maturity. We respectfully submit that it was error amounting to a denial of due process of law for the courts below to deny the plaintiff any opportunity to present evidence in support of these contentions. We submit that it was error of equal gravity to deny the plaintiff any opportunity to subject the defendants'

contrary contentions to any form of probative procedure.[10]

As to the petitioner's claim of injury to his power of impeachment, the decision of the court of appeals appears to rest finally not on the ground that no injury has been *claimed*, but rather on the ground that until the Congress itself has upheld the proposition that de facto

10. On August 27, 1976, the plaintiff served a request for admissions under Rule 36(a), F.R.C.P., but the district court granted a protective order on motion of the defendants over plaintiff's opposition. C.A. App. 2; Record, Sept. 23, Oct.1, Oct. 4, 1976.

While the District Court did not give its reasons for granting the motion, the circumstances left little doubt that any further effort on the part of the plaintiff to invoke probative procedures would have been an exercise in futility. Responding to the request would have imposed no serious burden on the defendants: the admissions which were sought simply track the allegations of the complaint, and while a response might have involved some soul-searching, it certainly would not have involved the kind of file-searching that has led to characterizations of oppressiveness in connection with pre-trial procedures. In his Opposition to Defendants' Motion for a Protective Order on Plaintiff's Request for Admissions, Record, October 1, 1976, the plaintiff said,

"Defendants have raised numerous and serious factual issues in a document they filed July 30, 1976, entitled 'Points and Authorities in Support of Defendants' Motion to Dismiss.' It is a document composed with little or no regard for the well-known rule that on such a motion, the allegations of the Complaint, unless patently insupportable, are to be taken at face value.

"It is grossly unfair to permit the Defendants to attempt to influence the Court's decision by liberally larding a memorandum of law with factual innuendoes, assertions, and denials, while escaping the responsibility of formally pleading their defenses."

officers are jurisdictionally immune to impeachment, no injury can be *proved* (*infra*, pp. 14A-15A, notes 20, 21). This presents the plaintiff with a catch-22 situation in which he cannot litigate the constitutionality of an act of Congress until Congress itself finds, in effect, that the act was unconstitutional.

From a jurisprudential viewpoint, perhaps an even more important consideration is that unless the inability to prove an injury is so self-evident as to make the claim frivolous, contesting the ability of the plaintiff to make such proof goes to the merits. Orderly judicial process requires that if such a defense is raised, the plaintiff be given an opportunity to rebut it, and where the relief sought is an injunction against the operation of a Federal statute, the plain jurisdictional mandate of 28 U.S.C. §2282, as in effect with respect to actions commenced before August 13, 1976, is that the plaintiff must be afforded the opportunity to present his proof in a district court of three judges. The court of appeals, we respectfully submit, in effect affirmed the district court's result by reaching the merits of the plaintiff's claim of injury, and thereby exceeded its jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Grasty Crews, II,
Attorney for the Petitioner.

October 1978.

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1012

HENRY S. REUSS, APPELLANT

v.

JOHN J. BALLES, *et al.*

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil 76-1142)

Argued December 5, 1977

Decided July 7, 1978

Grasty Crews, II, for appellant.

Michael Kimmel, Attorney, Department of Justice, with whom *Barbara Allen Babcock*, Assistant Attorney General, *Leonard Schaitman*, Attorney, Department of Justice, and *Earl J. Silbert*, United States Attorney, were on the brief, for appellee.

Before: WRIGHT, *Chief Judge*, and TAMM and WILKEY, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* TAMM.

Dissenting opinion filed by *Chief Judge* WRIGHT.

TAMM, *Circuit Judge*: Appellant Henry S. Reuss, a United States Congressman from Wisconsin, commenced this action in the United States District Court for the District of Columbia, seeking declaratory and injunctive relief from the allegedly unconstitutional composition of the Federal Open Market Committee, an integral component of the Federal Reserve System. The district court (Parker, J.) dismissed the complaint, finding that appellant lacked standing to sue, both in his capacity as a congressman and as an owner of certain marketable bonds. *Reuss v. Balles*, 73 F.R.D. 90 (D.D.C. 1976). We affirm.

I

The Federal Reserve System was created by Congress in 1913 as this nation's central bank. Unlike similar institutions in other countries, it is not a single entity, but rather a composite of several parts, both public and private, organized on a regional basis with a central governmental supervisory authority. The System consists of a seven-member Board of Governors, twelve regional Federal Reserve Banks, the Federal Open Market Committee (FOMC), the Federal Advisory Council, and approximately 6000 privately owned, commercial banks.[1] The key to success of the System is harmonious interaction between and among these component parts.

The function of the Federal Reserve System in the conduct of monetary policy is to assist in achieving national economic goals through its influence on the availability

[1] *See* 12 U.S.C. §§ 221-522 (1976); Joint Appendix (J.A.) at 36.

and cost of bank reserves, bank credit, and money. The three primary instruments employed by the System in the formulation and execution of general monetary policy are: 1) open market operations; 2) regulation of member bank borrowings from the Federal Reserve Banks; and 3) establishment of member bank reserve requirements. The most flexible, and perhaps the most important, of these monetary policy tools is the open market instrument.[2]

Since the inception of the Federal Reserve System, the twelve Federal Reserve Banks have been statutorily empowered to participate in a wide variety of financial transactions in the open market.[3] In one of the earliest cases to discuss the functioning of the Federal Reserve, Judge Augustus N. Hand summarized these open market operations as follows:

> [The Federal Reserve Banks may] purchase and sell in the open market at home or abroad cable transfers and bankers' acceptances and bills of exchange of the kinds and maturities eligible for rediscount. They may deal in gold coin and bullion at home and abroad; buy and sell, at home and abroad, bonds and notes of the United States, and bills, notes, revenue bonds, and warrants with a maturity from date of purchase of not exceeding six months, issued by any state, county, district, political subdivision, or municipality in the United States . . . . They may purchase from member banks, and sell, bills of exchange arising out of commercial transactions, and may "establish from time to time, subject to review and determination by the Federal Reserve Board, rates of discount to be charged by the Federal Reserve Bank for each class of paper, which shall be fixed with a view of accommodating commerce and

[2] *See* J.A. at 39; Brief for the Plaintiff-Appellant at 18 & n.23.

[3] *See* 12 U.S.C. §§ 348a, 353-359 (1976).

> business." They may establish accounts with other Federal Reserve Banks . . . [and] may open accounts and establish agencies in foreign countries for the purpose of purchasing, selling, and collecting bills of exchange. They may purchase and sell in the open market, either from or to domestic banks, firms, corporations, or individuals, acceptances of Federal Intermediate Credit Banks and of national agricultural credit corporations . . . .
>
> The foregoing provisions enable the Federal Reserve Banks, without waiting for applications from their member banks for loans or rediscounts, to adjust the general credit situation by purchasing and selling in the open market the class of securities that they are permitted to deal in. The power "to establish from time to time, subject to review and determination of the Federal Reserve Board, rates of discount to be charged by the Federal Reserve Bank," appears in the act . . . with the open market powers. The two powers are correlative and enable the Federal Reserve Banks to make their rediscount rates effective. The sale of securities does not lessen the total amount of credit available, but, by necessitating payment to the Federal Reserve Banks, increases available credit in their hands, "with a view of accommodating commerce and business," as provided by the act.

Raichle v. Federal Reserve Bank, 34 F.2d 910, 913-14 (2d Cir. 1929).

Four years after the *Raichle* decision, in recognition of the growing importance of open market operations as an element of national monetary policy, Congress created the FOMC.[4] The function of the FOMC was to initiate policy recommendations to the Board of Governors for the conduct of open market operations, and the Federal Reserve Banks were, for the first time, prohibited from

[4] Banking Act of 1933, ch. 89, § 8, 48 Stat. 168.

transacting in the open market except in accordance with Board regulations. Each Reserve Bank was left free, however, to decline to participate in operations approved by the Board.

The permissive nature of this initial structure proved to be ineffectual, and, in 1935, Congress elevated the role of the FOMC to its present dominant position.[5] In unequivocal language, 12 U.S.C. § 263(b) (1976) states:

> No Federal Reserve bank shall engage or decline to engage in open-market operations under sections 348a and 353 to 359 of this title except in accordance with the direction of and regulations adopted by the Committee. The Committee shall consider, adopt, and transmit to the several Federal Reserve banks, regulations relating to the open-market transactions of such banks.

Also since 1935, the FOMC has been composed of the seven members of the Board of Governors, who are appointed by the President with the advice and consent of the Senate, and five representatives of the Federal Reserve Banks, elected annually by the boards of directors of the Banks. 12 U.S.C. § 263(a) (1976). Initially, there were no restrictive qualifications for the appointment of these latter five members, but, in 1942, Congress mandated that they be either presidents or first vice presidents of the Federal Reserve Banks,[6] individuals who are selected with the approval of the Board of Governors. Thus, the FOMC now consists of seven members who hold their offices by virtue of presidential appointments confirmed by the Senate, and five members who hold their offices subject ultimately only to the approval of the Board of Governors.

[5] Banking Act of 1935, ch. 614, § 205, 49 Stat. 705.

[6] Act of July 7, 1942, ch. 488, § 1, 56 Stat. 647.

On June 21, 1976, appellant brought this action in the district court, seeking a declaratory judgment that 12 U.S.C. § 263(a) is unconstitutional because the five Reserve Bank members of the FOMC are not appointed pursuant to the Appointments Clause of the Constitution.[7] He reasoned, in part, that, since these individuals are "exercising significant authority pursuant to the laws of the United States," *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam), they are thus "Officers of the United States" who are required to be appointed by the President subject to Senate confirmation. He also sought an injunction prohibiting the Reserve Bank members from serving on the FOMC, and prohibiting the Federal Reserve Banks from complying with FOMC directives and regulations considered or adopted while any Reserve Bank member was serving on the FOMC.[8] Defendants to

[7] Article II, section 2, clause 2, states, in pertinent part:

> [The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

[8] J.A. at 14. Because appellant sought to enjoin enforcement of a federal statute as being repugnant to the Constitution, application was made to convene a three-judge court pursuant to 28 U.S.C. § 2282 (1970), which was still in force at the time this action was filed. J.A. at 15; *see* Pub. L. No. 94-381, § 2, 90 Stat. 1119 (Aug. 12, 1976). Judge Parker correctly ruled that "a single judge may first determine whether the court has jurisdiction to hear the case before requesting a three-judge court. *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 100 (1974)." Reuss v. Balles, 73 F.R.D. 90, 92 (D.D.C. 1976); *see* Ex parte Poresky, 290 U.S. 30, 31-32 (1933); Bryan v. Federal Open Mkt. Comm., 235 F. Supp. 877, 880 (D. Mont. 1964).

the action included the five Reserve Bank members of the FOMC, and their alternates, and the twelve Federal Reserve Banks.

Appellant averred that he had standing to sue in two capacities. As a legislator,[9] he claimed that the power conferred on him by article I, section 2, of the Constitution to initiate impeachment proceedings against civil officers of the United States is diminished because the Reserve Bank members of the FOMC, as currently selected, are "jurisdictionally immune to the impeachment process;"[10] he also claimed that improper delegation of responsibilities to the FOMC resulted in a usurpation of his powers, under article I, section 8, of the Constitution, to coin and regulate the value of money, to regulate commerce, and to borrow money on the credit of the United States.[11] As owner of "certain marketable bonds" valued in excess of $20,000, he maintained that actions taken by

[9] Congressman Reuss represents Wisconsin's fifth congressional district. He serves as Chairman of the Committee on Banking, Finance and Urban Affairs.

[10] Brief for the Plaintiff-Appellant at 12. Appellant's reference to this ground in his amended complaint was somewhat less precise. *See* J.A. at 12; Brief for the Plaintiff-Appellant at 12 n.4. However, since the impeachment theory was fully developed in, and ruled upon by, the district court, and briefed and argued on appeal, we will treat it as having been properly presented. *See generally* Warth v. Seldin, 422 U.S. 490, 501-02 (1975).

One principal reason that appellant amended his original complaint was to advance a theory, related to the impeachment theory, that his ability to "participate in the process of selection of officers of the United States . . . through negotiation with representatives of the Senate" had been diminished. J.A. at 12. The district court ruled against appellant on this theory, Reuss v. Balles, 73 F.R.D. at 97, and he did not present it in this appeal. *See* Brief for the Plaintiff-Appellant at 1.

[11] J.A. at 12.

the FOMC might result in his being deprived of property without due process of the law.[12]

On motion by the Government,[13] Judge Parker dismissed the complaint for lack of jurisdiction over the subject matter. He found that appellant had failed to demonstrate standing either as a congressman or bondholder. With regard to the latter capacity, he stated, among other reasons, that appellant "failed to allege any causal connection between the allegedly improper selection of the Reserve Bank representatives . . . and any possible impact on the value of his securities. Thus . . . it is not clear that the alleged injury would be redressed by a favorable decision." *Reuss v. Balles*, 73 F.R.D. at 98. Appellant's argument concerning his diminished legislative powers was rejected, in part, for identical reasons. *See id.* at 96-97; note 19 *infra*, and accompanying text. Finally, his impeachment claim was dismissed as "remote, conjectural and insufficient," *id.* at 96. This appeal ensued.

II

The question of standing "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast v. Cohen*, 392 U.S. 83, 99 (1968). Although appellant's status as a legislator introduces somewhat unique considerations into the case at bar, we must bear in mind that there are no special standards to be employed in analyzing legislator standing questions. *Harrington v. Bush*, 553 F.2d 190, 204 (D.C. Cir. 1977). Thus, no matter how inclined we may be toward appellant's position on the merits, we must first satisfy ourselves that he "has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and

[12] *Id.* at 6, 12-13.

[13] *Id.* at 26.

to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).[14]

[14] An increasing number of congressmen and senators are repairing to the courts, either instead of, or after, resorting to the political process, to challenge executive actions and policies. *See, e.g.*, Edwards v. Carter, No. 78-1166 (D.C. Cir. Apr. 6, 1978). Such cases, because of their almost inevitable political overtones, present the courts with some very difficult jurisdictional questions.

As indicated in our discussion in American Jewish Congress v. Vance, No. 76-1983 (D.C. Cir. Apr. 21, 1978), concerning the interrelationship between standing to sue and the political question doctrine, we believe that, in general, the standing inquiry in cases such as these should be resolved first. Slip op. at 6-7. If there is a determination of lack of standing, the case should be dismissed on that ground.

However, we are mindful that these cases often present precisely those considerations that may require resolution by resort to the political question doctrine. *See* Harrington v. Bush, 553 F.2d 190, 194 n.6 (D.C. Cir. 1977); Bryan v. Federal Open Mkt. Comm., 235 F. Supp. at 882; Note, *Congressional Access to the Federal Courts*, 90 HARV. L. REV. 1632, 1643-52 (1977). Thus, if the court believes the plaintiff *does* have standing to sue, but has presented a nonjusticiable political question, it should dismiss the complaint on that latter ground. Any discussion of standing, therefore, would be rendered pure dictum, *see* Harrington v. Bush, 553 F.2d at 207; note 15 *infra*, and, because our overriding concern is to avoid constitutional determinations unless essential to the disposition of the case, *see* Harmon v. Brucker, 355 U.S. 579, 581 (1958) (per curiam), the court should consider eliminating, or certainly limiting, these ancillary standing discussions.

Finally, if the court believes that the plaintiff has standing and has not presented a political question, it may, nonetheless, because of the unusual circumstances of the case, dismiss for want of equity. American Jewish Congress v. Vance (McGowan, J., concurring separately); Note, *Congressional Access to the Federal Courts*, *supra*, at 1652-54.

In making this determination, we must "accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. at 501. Thus, for purposes of reviewing the district court's dismissal of the complaint, we shall assume that the five Federal Reserve Bank representatives are serving on the FOMC illegally, in that they should have been appointed by the President with the advice and consent of the Senate. The "critical question" that remains, however, is "whether this assumed illegality has *resulted* in any judicially cognizable injury" to appellant. *Metcalf v. National Petroleum Council*, 553 F.2d 176, 180 (D.C. Cir. 1977). With these general considerations in mind, we turn now to an analysis of each of appellant's asserted bases for standing.

A. *Standing as a Legislator.*

Although it certainly has had the opportunity to be more expansive, this court has exercised a high degree of caution in delimiting the scope of legislator standing: In only one case, *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974), have we *held* that a legislator had standing to sue.[15] This apparent parsimony derives not from

[15] In Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973), where the complaint was dismissed because a political question was presented, we indicated, in dictum only, that the congressmen in question had standing to sue because the declaratory judgment sought would "bear upon" their constitutional duties to impeach executive officials, to appropriate funds, and to formulate subsequent legislation. *Id.* at 614; *see* note 14 *supra*. *But see* Harrington v. Bush, 553 F.2d at 207-09; *Congressional Access to the Federal Courts*, *supra* note 15, at 1638 & n.43.

This court has been involved to a limited degree in two other cases in which legislators were found to have standing to sue. In Williams v. Phillips, 360 F. Supp. 1363 (D.D.C.), *stay denied*, 482 F.2d 669 (D.C. Cir. 1973), a number of senators were found to have standing to challenge the appointment of an acting agency director as circumventing their right

any preconceived notions concerning such cases, but rather from an awareness that, as noted above, a legislator receives no special consideration in the standing inquiry.

In *Kennedy*, a United States senator was held to have standing to sue to challenge the legality of an attempted pocket veto of a bill for which he had voted; the impairment of the efficacy of his vote was found to demonstrate sufficient injury in fact. Even in that case, however, we stressed that the vindication of the effectiveness of his vote was the senator's most "essential" interest, and that it was asserted "in the context of a particular dispute about specific legislation." *Id.* at 436; *see Coleman v.*

to participate in the confirmation of federal officers. This court did not rule on the standing determination, 482 F.2d at 671, which, to a significant degree, was based upon the now-questionable *Mitchell* "bear upon" standard. 360 F. Supp. at 1366. In Pressler v. Simon, 428 F. Supp. 302 (D.D.C. 1976) (three-judge court) (per curiam), *aff'd mem. sub nom.* Pressler v. Blumenthal, 98 S. Ct. 758 (1978), a congressman prevented by application of federal statutes from voting on the ascertainment of congressional salaries, a legislative duty mandated by the Ascertainment Clause, was held to have standing to sue because his vote had been impaired; the district court, however, ruled against the plaintiff on the merits. Justice Rehnquist, concurring in the Supreme Court's affirmance, thought it important

> to point out that such affirmance does not necessarily reflect this Court's agreement with the conclusion reached by the District Court on the merits of the Ascertainment Clause question. The District Court decided that appellant did have standing to litigate this issue by virtue of the fact that he was a Member of Congress, but decided the issue against him on the merits. *Our "unexplicated affirmance" without opinion could rest as readily on our conclusion that appellant lacked standing to litigate the merits of the question* as it could on agreement with the District Court's resolution of the merits of the question.

Id. (emphasis added).

Miller, 307 U.S. 433 (1939). Neither of the legislator standing theories in the instant case presents a situation where appellant's vote will be derogated, or a situation sufficiently analogous to warrant a determination of standing to sue.

1. *Currency, Commerce, and Borrowing Powers.*

The essence of this theory is that, without presidential appointment of all its members, the FOMC is essentially a private group to which the specified legislative functions have been improperly delegated. If this is true, appellant reasons, then actions taken by the FOMC usurp powers still belonging to the Congress, thus injuring appellant as a member of that body.[16]

As appellant correctly notes,[17] the district court's analysis of this theory was, in part, somewhat misconceived. By indicating at the outset of its analysis that there is no improper delegation because the FOMC is not a completely private group,[18] the court was, in effect, rendering a decision on the merits, thus exceeding its jurisdiction in light of the request for a three-judge court. Instead, the court should have assumed that the FOMC is a private group exercising improperly delegated powers, and then asked whether that fact injured an interest of the appellant. In our view, it does not.

The interest sought to be protected by the appellant under this theory is his role in the formulation and regulation of general monetary policy. The defect in his theory, however, is that even if we were to declare, in effect, that all members of the FOMC had to be presi-

[16] Brief for the Plaintiff-Appellant at 20, 26-34.

[17] *Id.* at 29-30.

[18] Reuss v. Balles, 73 F.R.D. at 96-97. After reaching this unnecessary conclusion, however, the court did cite an acceptable rationale for its finding of no standing. *Id.* at 97.

dential appointees, the same responsibilities currently delegated to the FOMC would remain so delegated. The fact that appellant's role vis-à-vis monetary policy would in no way be enhanced by such a declaration indicates that his legislative powers, including relevant votes either in committee or on the floor, are not currently adversely affected in any respect; there is, therefore, no injury in fact that would be redressed by a favorable decision. Thus, we are in accord with the district court's determination of, but not all its reasoning for, a lack of standing under this theory. *See Warth v. Seldin*, 422 U.S. at 508.[19]

2. *Impeachment Power.*

Under this theory, appellant maintains that the method of selection of the Reserve Bank representatives of the FOMC renders them "jurisdictionally immune" to the power of impeachment vested in the House of Representatives. This fact, he reasons, diminishes his power to initiate impeachment proceedings as provided by article I, section 2, of the Constitution.

The district court decided against appellant on this theory, primarily because there were "no specific allega-

[19] Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), relied upon to a significant degree by appellant, does not compel an opposite result. In that case, the Court reversed a company's *criminal* conviction for violation of an industry code by holding that the National Industrial Recovery Act was unconstitutional because it delegated legislative functions, including the establishing of these codes, to completely private groups. A company that could demonstrate *existing or imminent injury in fact* caused by the industry codes formulated by these private groups might have standing to challenge the composition of the groups in a civil suit. *See* Buckley v. Valeo, 424 U.S. 1, 11-12 & n.10 (1976) (per curiam). It does not follow, however, that a legislator, genuinely concerned about the groups' composition but not adversely affected in any way, could maintain a similar cause of action.

tions of wrongdoing" by the Reserve Bank representatives that would be grounds for their impeachment. *Reuss v. Balles*, 73 F.R.D. at 96. While we express no opinion on whether such allegations of wrongdoing would form a basis, or the only basis, for impairment of a House member's share of the impeachment power,[20] we do hold that the allegations appellant has advanced in this case are insufficient to confer standing based upon his impeachment theory.

Central to our reasoning for this holding, as it was in our rejection of the preceding theory, is that appellant, "to have standing, must have a *stake* in the controversy at issue, *i.e.*, he himself must perceptibly win or lose depending on the outcome." *Harrington v. Bush*, 553 F.2d at 209. Even if we were to declare, in effect, that the Reserve Bank representatives had to be presidentially appointed, the appellant's interest relative to the impeachment process—primarily the power to initiate impeachment proceedings—would not be changed in the slightest from its present position, since there is nothing to suggest

[20] At oral argument, Chief Judge Wright questioned whether appellant, or any litigant, had to await actual wrongdoing before bringing an action under this theory, since the threat of impeachment acts as a deterrent to misconduct by civil officers of the United States. Although we agree with the thrust of this contention—that the Reserve Bank members may act less responsibly than they would if declared to be subject to impeachment, *see* THE FEDERALIST, No. 77 (A. Hamilton)—we do not see how it benefits appellant's standing argument, because of the very generalized nature of an injury arising from this fact. While sharing an injury with a large number of persons does not vitiate one's standing, *see* Warth v. Seldin, 422 U.S. at 501; Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972), sharing it with every citizen of the United States does, "because of the necessarily abstract nature of the injury all citizens share." Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220-21 (1974); Ex parte Lévitt, 302 U.S. 633, 634 (1937).

that he cannot now introduce a bill of impeachment.[21] This fact reveals that appellant's complaint for a declaratory judgment is, in actuality, nothing more than "a request for an advisory opinion in clear violation of Article III limitations." *Id.* We must, of course, deny this request.

Our rejection of appellant's legislator standing theories does not leave him without any means to remedy the allegedly unconstitutional composition of the FOMC. He may, as he has done in the past without ultimate success,[22] introduce a bill requiring all FOMC members to be presidential appointees. *See Public Citizen v. Sampson*, 379 F. Supp. 662, 666-67 (D.D.C. 1974), *aff'd mem.*, 515 F.2d 1018 (D.C. Cir. 1975). This circumstance, while certainly not fatal to his standing claim, does illustrate that his actual controversy lies, or may lie, with his fellow legislators; no supposed impairment of his legislative functions is due, in any part, to the actions or omissions of the named defendants. *See Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976).

B. *Standing as a Bondholder.*

As a holder of certain marketable bonds, appellant maintains that he has standing to sue because actions taken by the FOMC pursuant to its pervasive regulatory

[21] If he were to introduce a bill of impeachment, the question of whether de facto civil officers of the United States are "jurisdictionally immune to the impeachment process" would be sharply presented. We believe that there is particular benefit in this question arising first in the Congress, the branch entrusted by the Constitution with responsibility for exercise of the impeachment power. We venture no opinion on whether the House of Representatives, or the Senate, would reject such a bill on jurisdictional grounds, or on what course a court might take if confronted with such a rejection as a ground for standing.

[22] J.A. at 46-47.

authority might result in his being deprived of property without due process of the law. In particular, he asserts that these actions, because of their effect on interest rates and the rate of inflation, could reduce the value of his bonds in several ways."[33]

[33] Appellant's amended complaint detailed the bondholder standing theory as follows:

> 29. By serving as members of the Federal Open Market Committee, the individual defendants exercise governmental power which can substantially and adversely affect property of the plaintiffs, thereby depriving him of such property without due process of law in the following ways:
>
> (a) By voting to increase prevailing interest rates, the defendant individuals can reduce the market value of the plaintiff's bonds, thereby reducing his net worth and his ability to borrow money.
>
> (b) By voting to decrease prevailing interest rates, the defendant individuals can reduce the returns available to the plaintiff upon the reinvestment of funds derived from the payment of his bonds at maturity, thereby diminishing the plaintiff's future income.
>
> (c) By voting to increase the availability of money and credit, the defendant individuals can reduce the purchasing power of the dollar, thereby diminishing the value in so-called constant dollars or real terms of the plaintiff's bonds.
>
> (d) By voting to decrease the availability of money and credit, the defendant individuals can bring about a general reduction in economic activity sufficient to impair the ability of the obligors on the plaintiff's bonds to make payment of interest or principal or both, thereby diminishing or extinguishing their value.
>
> * * * *
>
> 31. By carrying out the orders of the Federal Open Market Committee in whose issuance there has been unconstitutional participation by the defendant individuals, the defendant banks carry on operations which may deprive the plaintiff of property to the extent or value of more than $10,000 without due process of law.

Id. at 12-13.

In spite of the amended complaint's effort to describe appellant's perceived injury in less speculative terms than those contained in the original complaint, we are of the view that the allegations still are not sufficient to confer standing. Appellant's summation of his most specific allegations provides particular support for this belief: "[A]ny action which the Defendants take *may* cause injury to some property interest of which the Plaintiff is possessed as a bondholder."[34] It appears, therefore, that there is no present or imminent injury to which appellant can point with any degree of specificity, and it is beyond our power to address injuries that are merely conjectural.

Even if appellant could allege a more concrete injury, he would have difficulty establishing that the injury was caused to a sufficient degree by the challenged actions of the appellees. The actions taken pursuant to decisions of the FOMC are but part, albeit an important part, of the forces that determine the value of one's financial holdings. Therefore, even if one considers the FOMC to be the most important component of the Federal Reserve System, it does not necessarily follow that the actions of its members and the Reserve Banks can be singled out in suits seeking to counter perceived declines in the nation's economy.

Further, the problem of redressability is at least as troublesome under this theory as it was under the legislator standing theories. There is no reason to believe that a declaration ultimately resulting in presidential appointment of the entire FOMC would benefit the appellant in any manner whatever, even assuming that a concrete injury caused by the appellees could be established. The

[34] Brief for the Plaintiff-Appellant at 34 (emphasis added).

same type of decisions would be made by the FOMC, contributing to both increases and decreases in interest rates, the rate of inflation, and other financial indicators.

Finally, even if appellant could overcome these obstacles, he would be faced with the fact that his is a very generalized grievance, one held in common, to some degree, by virtually all members of the public. Recently, for example, the Court of Claims denominated the effect of inflation on judicial salaries as being both indirect and nondiscriminatory. *Atkins v. United States*, 556 F.2d 1028, 1051 (Ct. Cl. 1977) (per curiam), *cert. denied*, 98 S. Ct. 718 (1978). The somewhat unusual features of long-term bonds do not sufficiently distinguish them from the many other forms that an individual's financial holdings can assume, and, since all forms of personal wealth are affected to some degree by actions of the type under challenge here, it is difficult to imagine how appellant could set himself apart from other citizens seeking some way to protect the value of their holdings. *See Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 220-21 (1974); *Bryan v. Federal Open Market Committee*, 235 F. Supp. 877, 881-82 (D. Mont. 1964). We hold, therefore, that appellant lacks standing to sue on his bondholder theory.

III

Before concluding, we wish to address appellant's argument that the Supreme Court's determination of standing in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), strongly supports his position in this case. We agree that there is a strong similarity between the *Buckley* challenge to the composition of the Federal Election Commission (FEC) and appellant's challenge to the composition of the FOMC, but we also believe there are crucial differences between the two situations.[18]

[18] Preliminarily, we note that a statute explicitly providing for judicial review of constitutional challenges was present

In its rather brief standing discussion in *Buckley*, the Court took care to stress twice the requirement that parties have to demonstrate a sufficient "personal stake" in the outcome of a controversy before they will be granted access to a federal court's remedial powers. *Id.* at 12 & n.10. Only after they are found to have "sufficient concrete interests at stake" can the parties proceed to raise other challenges, including "constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights." *Id.* at 12 n.10.

In the case before us, appellant has not satisfied this threshold requirement. Unlike the plaintiffs in *Buckley*, and the cases cited therein,[19] appellant has not demonstrated a personal stake so sufficient that he would benefit from a favorable decision on the merits. In *Buckley*, for example, plaintiffs persuaded the Court that they would benefit directly from a decision nullifying, *inter*

in *Buckley*. *See* Buckley v. Valeo, 424 U.S. at 8-9 & n.4, 11-12; 2 U.S.C. § 437h(a) (1976). Of course, as the Court explained, such review could only be provided to the extent permitted by article III. 424 U.S. at 11-12; *see* Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42 & n.22 (1976).

After establishing this analytical basis, the Court proceeded to conclude that "at least some of the appellants have a sufficient 'personal stake' in a determination of the constitutional validity of each of the challenged provisions." Buckley v. Valeo, 424 U.S. at 12 (footnote omitted). *But see id.* at n.11, question & answer 2. Although the Court was not more precise in identifying which plaintiffs had standing on which issues, it did make its standing determination based upon a complaint that details either immediate or imminent injury with a good deal more particularity than the complaint before us in this case. *Compare* Complaint for Declaratory & Injunctive Relief at 3-10, 28-29, 33, Buckley v. Valeo, *with* J.A. at 6, 11-13.

[19] Palmore v. United States, 411 U.S. 389 (1973); Glidden Co. v. Zdanok, 370 U.S. 530 (1962); Coleman v. Miller, 307 U.S. 433 (1939).

alia, those sections of the Federal Election Campaign Act that established reporting and disclosure requirements and that limited campaign expenditures and contributions. *See id.* at 12-84. In turn, they challenged the method of appointment of the members of the FEC, seeking an injunction prohibiting the FEC, until properly constituted, from enforcing these and the other provisions of the Act. This prohibition, at least arguably, was of benefit to those plaintiffs who intended to run for office in the 1976 election and whose rights in that campaign would, to a significant degree, be adjudicated by the FEC. *See id.* at 109-43. An injunction prohibiting the Reserve Bank members from participating in FOMC deliberations and decisions until properly appointed, however, would not be of similar benefit to the appellant. In the first place, the FOMC does not adjudicate his rights in any respect; moreover, as indicated above, neither his legislative powers nor the value of his bonds would be enhanced, secured, or otherwise affected by the relief requested. Indeed, the FOMC itself would continue to operate as a seven-member group until the new appointments were made, and there is nothing, short of speculative inference, to indicate that appellant's interests would be affected to any degree by this development. For these reasons, therefore, we believe the case at bar is distinguishable from *Buckley* and its supporting decisions.[27]

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[27] Of course, we do not mean to suggest that the composition of the FOMC is totally immune from challenge; the writ of quo warranto, for example, might be available as a direct attack device. *See* Associated Third Class Mail Users v. United States Postal Serv., 569 F.2d 570, 579 & n.24 (D.C. Cir. 1976) (per curiam), *vacated and remanded*, 434 U.S. 884 (1977); FED. R. CIV. P. 81(a)(2). We hold only that, on the facts presented, appellant has not established his standing to make that challenge.

IV

In conclusion, we affirm the district court and hold that appellant lacks standing to sue, both as a legislator and as a bondholder. In neither capacity has he met his responsibility "to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Warth v. Seldin*, 422 U.S. at 518.

Affirmed.

WRIGHT, *Chief Judge, dissenting*: In my view *Buckley v. Valeo*, 424 U.S. 1 (1976), clearly establishes that appellant Reuss has standing as a bondholder to challenge the constitutionality of the composition of the Federal Open Market Committee. For this reason—even apart from the difficult questions raised by his claims of legislative standing—I would reverse the judgment of the District Court.

In *Palmore v. United States*, 411 U.S. 389 (1973), and *Glidden v. Zdanok*, 370 U.S. 530 (1962), the Supreme Court addressed challenges to decisions reached or upheld by judges who, it was asserted, were not appointed and did not serve under Article III of the Constitution. In neither of these cases was there any question of impropriety in the actual conduct of the litigation by the judge in question. Nor was any argument made that the appellant would necessarily receive more favorable treatment or a positive disposition of his case were it relitigated before judges unquestionably appointed pursuant to Article III. No such showing was required; it was sufficient that the appellant alleged that his rights had been adjudicated by an unconstitutionally composed tribunal.

Relying on these decisions, the Supreme Court held in *Buckley v. Valeo* that appellants, a candidate for President, a candidate for reelection to the United States Senate, a potential contributor, and various political associations, had standing to challenge the constitutionality of the method of appointing members of the Federal Election Commission. The Court cited *Palmore* and *Glidden*, as well as its decision in *Coleman v. Miller*, 307 U.S. 433 (1939), for the proposition that "[p]arty litigants with sufficient concrete interests at stake may have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights." 424 U.S. at 117. While the Court noted that in *Glidden* "the challenged adjudication had

already taken place, whereas in this case appellants' claim is of impending future rulings and determinations by the Commission," the Court found that "this is a question of ripeness, rather than lack of case or controversy under Art. III." *Id.*

In this case, as in *Buckley*, the appellant's claim is that members of an agency whose decisions affect his rights and interests have not been appointed consistent with constitutional requirements of the Appointments Clause, Art. II, § 2. As in *Buckley*, the appellant has a concrete interest in the decisions of the agency involved. In this case it is derived from the fact that, as a holder of long-term bonds exceeding $20,000 in value, appellant's property interests will be affected by the actions taken by the FOMC which directly influence prevailing interest rates and, thus, the value of appellant's property.[1] While appellant's property rights are thereby "at

[1] Two questions have been raised by the majority with respect to appellant's claim that he has a concrete interest in the decisions reached by the FOMC. The first issue relates to the effect of FOMC actions on the value of appellant's holdings. The majority points out that the "actions taken pursuant to decisions of the FOMC are but part, albeit an important part, of the forces that determine the value of one's financial holdings." Maj. op. at 17. Appellant does not suggest that the FOMC is in any way omnipotent; he recognizes that FOMC decisions respond to various factors in the economy over which it does not have control. The fact remains, however, as the District Court and the majority both recognize, that FOMC decisions *do* have a definite effect on prevailing interest rates, and thus on the value of appellant's holdings. *See* Maj. op. at 17; J.A. 161. And should there remain any question as to this point, appellant should at least have been afforded the opportunity to prove the truth of what he asserted.

A second and related issue is raised by the majority's statement that appellant's grievance is "one held in common, to some degree, by virtually all members of the public." Maj. op. at 18. In the District Court appellant offered to introduce evidence to establish that there is a qualitative difference

stake" in the FOMC's decisions, he cannot establish, as the majority points out,[2] that the allegedly unconstitutional composition of the committee has resulted or will result in devaluation of his property or that he would be materially better off were the members of the Committee constitutionally appointed. But that is not required under *Buckley*: appellants in *Buckley* were nowhere required to establish that the method of appointing members to the FEC had any direct, adverse impact upon them, or that different and more favorable decisions would be reached by a properly constituted body. In this case, as in *Buckley*, *Glidden*, and *Palmore*, the fact that an individual's rights are being determined by an allegedly unconstitutionally composed body is, in itself, sufficient to meet the injury requirement and to permit the court to decide the merits of his constitutional challenge.

The majority today recognizes the "strong similarity between the *Buckley* challenge to the composition of the Federal Election Commission and appellant's challenge to the composition of the FOMC." Majority opinion at 18. It attempts to distinguish *Buckley*, however, on the

between the impact of FOMC decisions on a holder of currency and on a holder of long-term bonds. The District Court, however, without allowing appellant to introduce this evidence, simply stated that the appellant's contentions are "generalized concerns or grievances shared by many members of the public," a view adopted by the majority as well. Thus the majority concludes that "[s]ince all forms of personal wealth are affected to some degree by actions of the type under challenge here, *it is difficult to imagine how appellant could set himself apart from other citizens seeking some way to protect the value of their holdings.*" Maj. op. at 18 (emphasis added). Yet that is precisely what appellant offered to do in the District Court. Here again, appellant should at least be afforded an opportunity to introduce evidence as to a factual point which the majority views as critical before this court rules against him because of the absence of such proof.

[2] Maj. op. at 20.

ground that "[u]nlike the plaintiffs in *Buckley* and the cases cited therein, appellant has not demonstrated a personal stake so sufficient that he would benefit from a favorable decision on the merits." *Id.* at 19. Yet as noted earlier, the *Buckley* plaintiffs in no way demonstrated that the particular composition of the FEC—as distinct from the separate question of the existence of a body charged with enforcement responsibilities for an Act to which they objected [3]—caused them any direct injury or that they would receive different or more favorable treatment from a properly appointed body. Indeed, when the majority is forced to explicate its purported distinction, it can do no more than point out that a court

[3] Judge Tamm seems to suggest that the *Buckley* appellants' concrete interest in those sections of the Federal Election Campaign Act establishing reporting and disclosure requirements and limiting campaign expenditures and contributions "[i]n turn" provided appellants with a basis for challenging the method of appointing members to the FEC. Maj. op. at 20. There is no question, however, that the fact than an individual has standing to raise one claim—here, to the substantive provisions of the Act—does not afford him standing to raise other, separate claims—here, to the method of appointing Commission members. In *Buckley* the appellants' objections to the substantive provisions of the Act cited by Judge Tamm were in no way related to their challenge to the method of appointing FEC members; there was, I must emphasize again, no showing in *Buckley* that the unconstitutional composition of the Commission, in and of itself, caused the appellants any direct harm or that a properly constituted body would reach different decisions more favorable to their interests. To be sure, because they objected to the reporting requirements and expenditure and contribution provisions of the Act, the *Buckley* appellants might benefit from any relief which would undermine the statute's enforcement. But such benefits are relevant only to their challenges to these substantive provisions of the Act; they do not provide a basis for standing to raise the unrelated claim that the members of the Commission should be appointed by the President rather than by Congress.

order prohibiting the FEC, until properly constituted, from enforcing the Act, "*at least arguably*, was of benefit to those plaintiffs who intended to run for office in the 1976 election and whose rights in that campaign would, to a significant degree, be adjudicated by the FEC." *Id.* at 20 (emphasis added).

With all due respect, I find this distinction wholly unpersuasive. To begin with, the Supreme Court, in holding that the *Buckley* appellants had standing, nowhere mentioned, let alone relied upon, any benefit they would secure from an injunction against FEC operations until the Commission was properly constituted. Quite to the contrary, the Court granted a stay of its order insofar as it affected the powers of the Commission so as to "afford Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms *without interrupting enforcement of the provisions the Court sustains*, allowing the present Commission in the interim to function *de facto* in accordance with the substantive provisions of the Act." 424 U.S. at 143 (emphasis added). Moreover, even were there some benefit to be secured from a short-term delay in enforcing the provisions of the Act upheld by the Court, it is not at all clear why the particular appellants in *Buckley* who intended to run for office, as opposed, say, to their opponents, would derive such a benefit; certainly, what is involved is pure speculation in either event. The critical point of *Buckley* is that such a benefit was neither established nor required in order for the court to reach the merits of the appellants' claim.

In my view, there simply is no valid distinction to be drawn between the case before us and *Buckley v. Valeo*, and our decision today should therefore be controlled by *Buckley*. On this basis, I respectfully dissent from the decision of the majority.

APPENDIX B

In the United States Court of Appeals for the District of Columbia Circuit

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September Term, 1977

Civil 76-1124

[Filed Jul. 7, 1978; George A. Fisher, Clerk]

No. 77-1012

HENRY S. REUSS, Appellant

v.

JOHN J. BALLES, et al

Appeal from the United States District Court for the District of Columbia

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Before: WRIGHT, Chief Judge, and TAMM and WILKEY, Circuit Judges

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court
George A. Fisher,
Clerk,

Date: July 7, 1978
Opinion for the Court filed by Circuit Judge Tamm
Dissenting opinion filed by Chief Judge Wright

APPENDIX C

United States District Court for the District of Columbia

Civil Action No. 76-1142

HENRY S. REUSS, PLAINTIFF

v.

JOHN J. BALLES, ET AL., DEFENDANTS

Appearances

GRASTY CREWS, II, *Attorney for Plaintiff*

VINCENT B. TERLEP, Jr., REX E. LEE

DEPARTMENT OF JUSTICE, *Attorneys for Defendants*

Before BARRINGTON D. PARKER, *United States District Judge.*

Decided: December 22, 1976.

MEMORANDUM OPINION

Barrington D. Parker, District Judge:

The Honorable Henry S. Reuss, in his capacities as a Congressman [1] and as a bondholder,[2] has filed suit against various individuals who serve as officers of the Federal Reserve Banks and who also serve on the Federal Open Market Committee (Committee or FOMC), and against each of the twelve Federal Reserve Banks in the United

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[1] Plaintiff is a member of the House of Representatives and serves as chairman of that body's Committee on Banking, Currency and Housing. He also serves as chairman of the Subcommittee on International Economics of the Joint Economic Committee.

[2] In his amended complaint, plaintiff alleges that he owns certain marketable bonds whose aggregate cost, aggregate market value and aggregate face value exceed $20,000.

States.[3] Since the Committee exercises significant government functions, plaintiff contends that all of its members are officers of the United States and as such must be properly appointed pursuant to the Appointments Clause [4] of the Constitution. The Reserve Bank representatives to the FOMC are not appointed in accordance with the Appointments Clause but rather are selected by the boards of directors of the Reserve Banks pursuant to § 12A of the Federal Reserve Act, 12 U.S.C. § 263(a).[5] Plaintiff asks the Court to declare unconstitutional those portions of § 12A which provide for selection and service on the FOMC of Reserve Bank representatives and to enjoin permanently both the individual defendants from serving on the Committee and the defendant banks from carrying out any instructions issued by the allegedly unconstitutionally constituted Committee.

Plaintiff alleges that the cause of action arises under 28 U.S.C. § 1331 (federal question and jurisdictional

[3] Plaintiff's motion for leave to amend the second complaint to join the Committee as a party defendant need not be considered in view of the Court's disposition of this case.

[4] Art. II, § 2, cl. 2. The Appointments Clause provides that:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

[5] Section 263(a) provides in relevant part:

> [The] Federal Open Market Committee . . . shall consist of the members of the Board of Governors of the Federal Reserve System and five representatives of the Federal Reserve banks. . . . Such representatives shall be presidents or first vice presidents of Federal Reserve banks and. . . . shall be elected annually [by various combinations of the boards of directors of the twelve Federal Reserve banks]. . . . An alternate to serve in the absence of each such representative shall likewise be a president or first vice president of a Federal Reserve bank and shall be elected annually in the same manner.

amount) and § 1337 (action arises under an act regulating commerce, *viz*, 12 U.S.C. § 263) and under 12 U.S.C. § 632 (Federal Reserve Bank as a party to the action). He claims that as a Congressman and chairman of the House of Representatives' Committee on Banking, Currency and Housing the defendants are diminishing and usurping his powers. As a bondholder, he claims that he is deprived of his property without due process of law in violation of the Fifth Amendment.

Defendants have moved to dismiss the proceedings for lack of jurisdiction over the subject matter pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, asserting that the plaintiff has no standing to sue. They contend that since he has shown no injury in fact, either as a Congressman or as a bondholder, from the allegedly unconstitutional selection and service of the Reserve Bank representatives on the Committee, there is no case or controversy as required under Article III of the Constitution and that therefore any judgment rendered by the Court would be purely advisory.

Because plaintiff seeks to enjoin enforcement of a federal statute for repugnance to the Constitution, application for a three-judge court has been made. 28 U.S.C. §§ 2282, 2284.[6] However, when a motion to dismiss for lack of standing is presented, a single judge may first determine whether the court has jurisdiction to hear the case before requesting a three-judge court. *Gonzales* v. *Automatic Employees Credit Union*, 419 U.S. 90, 100 (1974).

The Court has reviewed the complaint, the memoranda of the parties and the relevant case and statutory authority and concludes that this proceeding should be dismissed because the plaintiff lacks standing to maintain this action, either as a Congressman or as a bondholder.

[6] On August 12, 1976, the three-judge court provisions of the United States Code were amended and, *inter alia*, § 2282 was repealed. Pub. L. 94-381, 90 Stat. 1119. However, plaintiff filed this action on June 21, 1976.

Factual Background

The Federal Reserve System was created by Act of Congress in 1913. It is a central banking system composed of a seven-member Board of Governors, each member appointed by the President and confirmed by the Senate; twelve regional Federal Reserve Banks; the Federal Open Market Committee; the Federal Advisory Council; and those privately-owned commercial banks that are members of the System. 12 U.S.C. § 221 et seq.

The Federal Reserve Banks are organized in the form of private business corporations. The commercial banks which are members of the System[7] own stock with voting rights in the Reserve Bank in their district. Six of the nine members of the board of directors of each Reserve Bank are elected by the member banks; the Board of Governors chooses the remaining three directors and appoints one to serve as chairman and one to serve as deputy chairman of the respective boards. The presidents and first vice presidents of the Reserve Banks are selected by the boards of directors of those banks, subject to the approval of the Board of Governors. 12 U.S.C. § 341. The Board of Governors is empowered to exercise general supervision over the Federal Reserve Banks and may suspend or remove any director or officer of any Reserve Bank for cause.

The FOMC directs and regulates the purchase and sale of government and other securities by the Reserve Banks in the open market[8] and thereby affects the supply of money.[9] The Committee is composed of the seven members of the Board of Governors and five representatives of the Reserve Banks, elected by various combinations

[7] National banks must be members of the System, 12 U.S.C. § 282; state-chartered banks may belong. 12 U.S.C. § 321.

[8] The Reserve Banks may neither engage nor decline to engage in open market operations "except in accordance with the direction of and regulations adopted by the Committee." 12 U.S.C. § 263(b).

[9] The functions of the Committee are discussed in some detail in Bryan v. Federal Open Market Committee, 235 F. Supp. 877 (D. Mont. 1964). *See also* Raichle v. Federal Reserve Bank, 34 F. 2d 910 (2d Cir. 1929).

of the boards of directors of those banks. The latter five must be presidents or first vice presidents of the Reserve Banks.[10]

The Federal Reserve System was established:

> to regulate the supply of money by raising or lowering the reserves of its member banks. When these reserves are raised, member banks find themselves with excess reserves and are thus in a position to make loans and investments by which the supply of money will increase further. Conversely, when the Federal Reserve lowers the reserves of its member banks, they will no longer be able to make loans and investments, or may even have to reduce loans or get rid of investments, thereby extinguishing deposit accounts and contracting the supply of money. Heilbroner, *Understanding Macroeconomics* 187 (4th ed. 1972).

The three chief means by which the System formulates and executes general monetary policy are open market operations, the regulation of member bank borrowings from the Reserve Banks through the discount rate, and the fixing of member bank reserve requirements. These actions affect the supply of money and credit in the country and thus influence interest rates. The most flexible and continuously used of these tools is the open market instrument.

The Question of Standing

If a party litigant fails to demonstrate that he has standing to sue, a federal court must decline to accept jurisdiction and to exercise its remedial powers. Thus, the plaintiff must meet the Article III requirement that there be a case or controversy by demonstrating that the allegedly unconstitutional appointment and service on the FOMC of the Reserve Bank representatives has caused him injury in fact which may likely be remedied

[10] 12 U.S.C. § 263(a). Five alternates to the Reserve Bank representatives are also selected. *See* note 5, *supra*.

by a favorable decision.[11] *See Simon* v. ***Eastern Kentucky Welfare Rights Organization,*** 96 S.Ct. 1917 (1976); *United States* v. *SCRAP,* 412 U.S. 669 (1973); ***Sierra Club*** v. ***Morton,*** 405 U.S. 727 (1972).

Standing "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." ***Flast*** v. ***Cohen,*** 392 U.S. 83, 99 (1968). As the Supreme Court most recently reaffirmed in ***Eastern Kentucky Welfare Rights,*** 96 S.Ct. at 1924:

> [T]he standing question in its Art. III aspect "is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' to warrant *his* invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf." [Citation omitted.] . ... [W]hen a plaintiff's standing is brought into issue the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsist with the Art. III limitation.

A party seeking relief from a federal court must allege facts from which it may reasonably be inferred that his injury resulted in a "concretely demonstrable way" from the defendant's actions and that the court may remedy the wrong which the plaintiff suffers. *Warth* v. *Seldin,* 422 U.S. 490, 504 (1975). A party may not seek comfort

[11] That plaintiff demonstrate injury in fact is the first requirement of the two-part test for determining standing to sue formulated by the Supreme Court in Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 152 (1970). The second, nonconstitutional part of the test requires that the interest sought to be protected by a party be "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153. *See* Simon v. Eastern Kentucky Welfare Rights Organization, 96 S.Ct. 1917, 1925 n. 19(1976). Because this Court finds that plaintiff has not been injured in fact either as a Congressman or as a bondholder, it need not consider the "zone of interests" test. *See, id.;* United States v. SCRAP, 412 U.S. 669, 686 n.13 (1973); Sierra Club v. Morton, 405 U.S. 727, 733 n.5 (1972).

in "the remote possibility, unsubstantiated by allegations of fact, that [his] situation might have been better had [the defendant] acted otherwise, and might improve were the court to afford relief." *Id.* at 507. Succinctly stated, Congressman Reuss must allege a particularized injury specifically resulting from the defendants' conduct. Should he fail in this regard, there is no jurisdiction to hear the claim, and the Court must dismiss the complaint or exceed its assigned role under Article III.

Standing as a Congressman

Several courts have considered the circumstances under which a Congressman has standing to sue, and by far the majority of recent litigation has been decided in this Circuit. Unlike those cases in which there has been a clear demonstration of sufficient injury in fact, Mr. Reuss asserts no specific impairment to the effectiveness of his vote as a member of Congress; neither does he sufficiently establish that the challenged procedures and actions have hindered the exercise of other congressional duties including participation in the confirmation of officers of the United States and consideration of impeachment.

A Congressman has been deemed to have standing to sue when executive action has impaired the efficacy of his vote. In ***Kennedy*** v. ***Sampson,*** 511 F. 2d 430 (D.C. Cir. 1974), a United States Senator who voted in favor of the Family Practice of Medicine Act challenged the legality of a purported pocket veto of that bill by the President. Because the effectiveness of his vote on a particular measure was at stake, the court found that the Senator had demonstrated sufficient injury to confer standing to sue. Similarly, in ***Pressler*** v. ***Simon,*** C.A. 76–782 (D.D.C. Oct. 12, 1976) (three-judge court), a Congressman prevented by the application of certain sections of federal statutes from voting on the ascertainment of congressional salaries, a legislative duty expressly mandated by the Constitution, was held to have standing to sue because his vote had been impaired. ***Cf. Coleman v. Miller,*** 307 U.S. 433 (1939).

Standing has also been found when Senators were deprived of their right to participate in the confirmation of federal officers nominated by the President. *Williams* v. *Phillips,* 360 F. Supp. 1363 (D.D.C.), *motion denied and remanded,* 482 F. 2d 669 (D.C. Cir. 1973). In *Williams,* the President had appointed an Acting Director of the Office of Economic Opportunity thereby circumventing the plaintiff-Senators' responsibility to confirm the Director pursuant to statute and the Appointments Clause.

Although there is a split of authority, the Court of Appeals of this Circuit in *Mitchell v. Laird,* 488 F. 2d 611 (D.C. Cir. 1973), held that Congressmen have standing to challenge the constitutionality of an allegedly unlawful war because of such a finding's effect on the duties of the Congressmen to consider impeachment of certain executive officers and to perform other legislative functions relating to the conduct of the war. In contrast to *Mitchell,* the Second Circuit ruled, *inter alia,* that a member of Congress who sought a declaration that military activities in Cambodia were unlawful and an injunction against the continuance of such activities lacked standing to sue. *Holtzman* v. *Schlesinger,* 484 F. 2d 1307 (2d Cir. 1973), *cert. denied,* 416 U.S. 936 (1974). Because the plaintiff had fully participated in congressional debates and because her vote had been rendered ineffective only by the contrary votes of her colleagues and not by any actions of the defendants, the court rejected the contention that the declaration was necessary for her properly to consider impeachment of the President. It concluded that an advisory opinion was sought from the court.

Similarly, in *Harrington* v. *Schlesinger,* 528 F.2d 455 (4th Cir. 1975), various plaintiffs, including four Congressmen, claimed that expenditure of tax monies in support of the recent Vietnam conflict violated federal statutes limiting involvement there and the Appropriations Clause of the Constitution. The Fourth Circuit rejected the Congressmen's claims of standing based upon their interest in fostering enforcement of laws for which

they voted and upon the effect a judicial declaration concerning the legality of the Executive's activities would have in pursuing their legislative duties. The court concluded that their interest was no different from any other citizen's and too generalized to grant standing, and particularly the court found at 459 that "[t]he plaintiffs' status as congressmen does not give them standing to sue for a declaration that Executive activities are illegal."

In no case has a member of Congress been held to have standing solely in that capacity to challenge the constitutionality of a federal statute. *See e.g., Harrington* v. *Schlesinger, supra. Metcalf* v. *National Petroleum Council,* 407 F. Supp. 257 (D.D.C. 1976), involved a challenge by a Senator who alleged that because the composition of the Council and its subgroups gave improper influence to industry special interests, those advisory bodies were functioning in violation of two federal statutes. The court ruled that because the Senator had helped to pass the statutes at issue, there was no question about the effectiveness of his votes. Moreover, because the Senate had the power to review the activities of the advisory groups as well as the power over appropriations, the Senator had suffered no real injury and thus lacked standing to sue.

In *Public Citizen* v. *Sampson,* 379 F. Supp. 662 (D.D.C. 1974), *aff'd without opinion,* 515 F.2d 1018 (D.C. Cir. 1975), various Congressmen challenged the constitutionality of certain regulations concerning title and patent rights to inventions which might be developed under government-financed research and development contracts. The court ruled, *inter alia,* that the Congressmen lacked standing to sue finding that by promulgating the regulations the defendant, Administrator of the General Services Administration (GSA), could not interfere with the right and power of the plaintiffs to participate in decisions concerning the disposition of government property and that they could at any time "propose legislation regulating the contractual authority of the [GSA]." 379 F. Supp. at 667. *Cf. Korioth* v. *Briscoe,* 523 F.2d 1271 (5th Cir. 1975).

Plaintiff has placed great reliance on the recent decision declaring unconstitutional certain portions of the Federal Election Campaign Act of 1971, as amended in 1974. *Buckley* v. *Valeo,* 424 U.S. 1 (1976). Indeed the *Buckley* Court found that "any appointee exercising significant authority pursuant to the laws of the United States is an Officer of the United States, and must, therefore, be appointed in the manner prescribed by [the Appointments Clause]." *Id.* at 126. However, regardless of the merits of plaintiff's claim that representatives on the FOMC must be appointed in accordance with the Appointments Clause, he still must meet the injury in fact test for this Court to have jurisdiction and thereby exercise its remedial powers.

Buckley found that because "at least some of the appellants [had] a sufficient 'personal stake' in a determination of the constitutional validity of each of the challenged provisions [of the Campaign Act]," *id.* at 12, a case or controversy was presented within the meaning of Article III. While the named plaintiff was a Senator, he appears to have challenged the statute in his capacity as a candidate for re-election. Moreover, the challenged statute itself conferred standing on any individual eligible to vote in a presidential election. *Buckley,* therefore, does not alter the requirement that legislators, including members of Congress, must demonstrate personal injury in fact in order to meet the standing requirement of Article III.

Mindful of the above rulings, the Court now addresses the allegations of injury by Congressman Reuss set forth in his complaint and memorandum opposing defendants' motion to dismiss. He alleges that the individual defendants by voting as members of the Committee while not properly appointed as officers of the United States hinder the exercise of his legislative powers and duties including deciding on impeachment; regulating commerce and the value of money and borrowing on the credit of the United States; and participating in the confirmation of presidential appointees. He further argues that by carrying out the orders of the unconstitutionally constituted Committee, the Reserve Banks interfere with his legislative duties to regulate the value of money and foreign exchange pursuant to Art. I, § 8, cl. 5 of the Constitution. The Court now turns to an analysis of each of plaintiff's allegations.

First, plaintiff argues that because the Reserve Bank representatives are not properly denominated as officers, they escape the reach of the impeachment power pursuant to Art. I, § 2, cl. 5 and Art. II, § 4 of the Constitution. Consequently, he allegedly suffers significant injury in his capacity as a Congressman.[11] However, there are no specific allegations of wrongdoing against the individual defendants. The claim that the Congressman's impeachment power has been infringed is remote, conjectural and insufficient.

Mr. Reuss further argues that because the Reserve Bank representatives are not properly designated as officers pursuant to the Appointments Clause, any delegation of congressional authority under Art. I, § 8 of the Constitution, including the power to coin money and regulate its value, to borrow money on the credit of the United States, and to regulate commerce, is improper. He appears to be arguing that because Reserve Bank members are not appointed pursuant to the Appointments Clause, the FOMC must be akin to a private agency. He relies upon *Schechter Poultry Corp.* v. *United States,* 295 U.S. 495 (1935), and contends that since congressional duties may be delegated only to governmental and not to private bodies, the attempted delegation of congressional power to those constitutionally ineligible to receive it is a nullity, and the individual defendants are exercising powers which are vested in the

[11] Defendants respond that because the presidents and first vice presidents of the Reserve Banks must be approved by the Board of Governors and because they are subject to removal for cause, the Reserve Bank representatives are properly appointed to the FOMC pursuant to the Appointments Clause as "inferior officers," and thus are subject to impeachment. The Court does not agree with defendants' assertion that the Reserve Bank members are inferior officers within the meaning of the Appointments Clause. However, because of the disposition of this case, the Court need not decide this issue.

Congress. Hence, plaintiff argues, his power as a Congressman is being usurped, and he suffers injury.

That argument, likewise, is without merit. In *Schechter,* Congress attempted to delegate legislative authority, *inter alia,* to trade and industrial associations which were to draw up "codes of fair competition" for their respective industries and then apply to the President for his approval. Unlike *Schechter* where the attempted delegation of legislative power was to completely private groups, in the instant action the majority of voting members of the FOMC are clearly officers of the United States. Moreover, while selected by the boards of directors of the Reserve Banks, the presidents and first vice presidents must be approved by the Board of Governors and thus arguably serve in more than a private capacity. Therefore, it cannot be reasonably argued that the delegation of congressional authority to the FOMC is to a private agency and thus improper.

Because the Senate, and not the House of Representatives, confirms presidential appointments made pursuant to the Appointments Clause, there is no merit to the allegation that plaintiff as a Congressman is harmed because of infringement on his powers to affect the confirmation process through negotiation with members of the Senate. Again, he fails to show adequate injury in fact.

Service on the FOMC by the Reserve Bank representatives in no way affects plaintiff's ability to perform his legislative duties. He may at any time introduce legislation to override the policies or actions of the Committee. *Cf. Metcalf* v. *National Petroleum Council,* 407 F. Supp. at 260; *Public Citizen* v. *Sampson,* 379 F. Supp. at 667. Accordingly, plaintiff has neither established a causal connection between the allegedly unconstitutional appointment and service on the Committee by the Reserve Bank representatives and his alleged inability to function as a legislator nor demonstrated how the relief he seeks will enhance his ability to perform his legislative responsibilities. *See Simon* v. *Eastern Kentucky Welfare Rights Organization,* 96 S. Ct. at 1926–27; *Warth* v. *Seldin,* 422 U.S. at 504–08.

STANDING AS A BONDHOLDER

In the amended complaint, the plaintiff as a bondholder alleges that the individual defendants' actions on

The plaintiff, in his capacity as a Congressman, has not met his burden. He has not alleged or demonstrated any injury in fact.[13]

the FOMC, including voting to raise or lower interest rates[14] and voting to increase or decrease the availability of money and credit, can reduce the value of his bonds and thus deprive him of his property without due process under the Fifth Amendment. The further allegation is made that the Reserve Banks, in carrying out FOMC directions, act in a manner which *may* deprive him of his property.[15] The substance of the argument is that the possession of the power to deprive him of his property by improperly appointed officials establishes personal injury in fact sufficient to confer standing to sue in his bondholder capacity.

At best, the plaintiff's contentions are generalized concerns or grievances shared by many members of the public,[16] and therefore the alleged injury is abstract and speculative. In *Schlesinger* v. *Reservists Committee to Stop the War,* 418 U.S. 208 (1974), plaintiffs brought a class action on behalf, *inter alia,* of all citizens and taxpayers claiming that the Armed Forces Reserve membership of members of Congress violated the constitutional provision prohibiting a person from holding an office under the United States while serving in Congress.

[13] Because plaintiff has demonstrated no injury in fact as a consequence of the individual defendants' service on the Committee, the Court need not consider his allegations against the Reserve Banks.

[14] Defendants argue that while the FOMC's activities may have an effect on interest rates, the Committee does not set those rates as the amended complaint asserts.

[15] Amended complaint, ¶¶ 29, 31.

[16] In Warth v. Seldin, *supra,* the Supreme Court noted that the question of standing involved both constitutional and prudential limitations on federal court jurisdiction. The Article III requirement that there be injury in fact sufficient to establish a case or controversy is, of course, a constitutional mandate. The fact that the claimed injury is a generalized grievance shared by a large class of citizens constitutes a prudential limitation. 422 U.S. at 498–99.

They alleged injury as a result of the failure by those so serving faithfully to discharge their duties as members of Congress. The Supreme Court ruled that the parties had no standing to sue as citizens because their claimed injury implicated only the generalized interest in constitutional governance shared by all citizens, an abstract injury and not the concrete injury necessary under Article III. *See also Warth* v. *Seldin, supra; Public Citizen* v. *Sampson, supra.*

As an investor, the plaintiff fails to point to any specific injuries sustained by him by reason of the selection procedures and service of the individual defendants. Because of the many factors which influence monetary conditions, including open market operations, his allegation that the value of his securities holdings is affected by the Committee's actions is uncertain and tenuous. Whatever the legal status of the selection procedures, plaintiff must still demonstrate that he has been injured in fact by the selection process and by the service on the Committee of the individual defendants. Otherwise, the Article III requirement that an actual case or controversy must exist before a federal court accepts jurisdiction is not met, and this Court would exceed its proper role in our system of government if it considered plaintiff's claim.

Additionally, plaintiff has failed to allege any causal connection between the allegedly improper selection of the Reserve Bank representatives or their service on the Committee and any possible impact on the value of his securities. Thus, the alleged injury may not even be a consequence of defendants' actions, and it is not clear that the alleged injury would be redressed by a favorable decision. *See Simon* v. *Eastern Kentucky Welfare Rights Organization,* 96 S. Ct. at 1926–27; *Warth* v. *Seldin,* 422 U.S. at 504–08.

As a bondholder, Congressman Reuss' status in this litigation is similar to that of the plaintiff in *Bryan* v. *Federal Open Market Committee,* 253 F. Supp. 877 (D. Mont. 1964). There, the plaintiff Bryan claimed standing as the owner of a treasury bill. He claimed, *inter*

alia, that its value was affected by the Committee's operations, that the Reserve Bank representatives took no oath of office and that the Committee acted under an unconstitutional delegation of power by Congress. The Montana District Court found that since Bryan had failed to show direct injury or to allege that his treasury bill would not be paid at maturity, his claims were speculative and tenuous. Further, he had alleged no "injury to himself apart from that suffered by all other owners of government obligations." *Id.* at 882. The missing factor in *Bryan* was injury in fact. The court thus concluded that plaintiff lacked standing to sue and granted the defendants' motion to dismiss on that ground. Similarly, Congressman Reuss, as a bondholder, has alleged no injury in fact.[17]

In sum, giving full weight to all material allegations of the complaint, the Court finds that plaintiff lacks standing to maintain this action. Accordingly, it is this *22nd* day of December, 1976,

ORDERED that the motion of defendants to dismiss the complaint is granted, and the complaint of the plaintiff be, and hereby is dismissed.

BARRINGTON D. PARKER,
United States District Judge.

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[17] Plaintiff's claim against the Reserve Banks also fails to demonstrate injury in fact.

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No. 78-579

In the Supreme Court of the United States

OCTOBER TERM, 1978

HENRY S. REUSS, PETITIONER

v.

JOHN J. BALLES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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INDEX

Page

Opinions below 1

Jurisdiction 1

Question presented 2

Statement 2

Argument 4

Conclusion 10

CITATIONS

Cases:

Buckley v. *Valeo*, 424 U.S. 1 ..... 4, 5

Glidden Co. v. *Zdanok*, 370 U.S. 530 5

Muskrat v. *United States*, 219 U.S. 346 9

Palmore v. *United States*, 411 U.S. 389 5

Schlesinger v. *Reservists Committee to Stop the War*, 418 U.S. 208 8

Simon v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 ..... 4, 6

Statutes:

12 U.S.C. 263(a) 2

12 U.S.C. 263(b) 2

12 U.S.C. 263(c) 2

12 U.S.C. 341 2

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-27A) is not yet reported. The opinion of the district court (Pet. App. 31A-45A) is reported at 73 F.R.D. 90.

JURISDICTION

The judgment of the court of appeals (Pet. App. 29A-30A) was entered on July 7, 1978, and a petition for rehearing was denied on August 14, 1978. The petition for a writ of certiorari was filed on October 6, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner has standing, either as a legislator or as a bondholder, to challenge the composition of the Federal Open Market Committee of the Federal Reserve System.

STATEMENT

Petitioner is a member of the House of Representatives and the owner of marketable long-term bonds valued in excess of $20,000. He brought this action in the United States District Court for the District of Columbia seeking declaratory and injunctive relief from the allegedly unconstitutional composition of the Federal Open Market Committee of the Federal Reserve System.[1] Petitioner contended that the five "Reserve Bank" members of the Committee were serving illegally because they were not nominated by the President and confirmed by the Senate.

Petitioner alleged that he had standing to assert this claim on the basis of three theories. First, he alleged that, as a House member, his power to initiate impeachment proceedings against these five officials would be or remain adversely affected unless they were appointed by the President with Senate confirmation. Second, he alleged that his interest in legislative regulation of monetary policy would be or remain adversely affected unless the

[1]The Federal Open Market Committee directs the open market operations of the Federal Reserve System. 12 U.S.C. 263(b), (c). The Committee is composed of the seven members of the Board of Governors of the Federal Reserve System (who are appointed by the President, subject to Senate confirmation) and five representatives (either the president or first vice-president) of the regional Reserve Banks (who have been appointed by the boards of directors of those banks, with the approval of the Board of Governors, and are then elected to their positions on the Committee). 12 U.S.C. 263(a) and 341.

five Reserve Bank members were either removed from office or appointed by the President with Senate confirmation. Third, he alleged that actions of the Committee "can substantially and adversely affect" the value of his bonds (Pet. App. 16A n.23). The district court held that none of these interests is sufficient to establish standing, and it accordingly dismissed the complaint (*id.* at 31A-45A).

The court of appeals affirmed (Pet. App. 1A-21A). The court held that petitioner had not alleged any injury to his interest in the power of impeachment since, aside from the absence of any suggestion of current or imminent wrongdoing by the five Reserve Bank members, there was nothing to indicate that petitioner could not initiate impeachment proceedings at an appropriate time (*id.* at 13A-15A).[2] The court also concluded that petitioner's interest in legislative regulation of monetary policy would not be affected by the relief sought because the Committee would continue to exercise the same substantive regulatory powers even if the Reserve Bank members were removed or the method of their selection were revised (*id.* at 12A-13A).[3]

Finally, the court of appeals rejected petitioner's contention that he had standing as a bondholder. Although the court did not dispute that the value of petitioner's bonds might be affected by the Committee's

[2]The court ventured no opinion on whether, if petitioner were to introduce a bill of impeachment, "the House of Representatives, or the Senate, would reject such a bill on jurisdictional grounds, or what course a court might take if confronted with such a rejection as a ground for standing" (Pet. App. 15A n.21).

[3]Petitioner has recognized the validity of the court of appeals' analysis and has abandoned his claim of injury to his interest in legislative regulation of monetary policy (Pet. 13 n.6).

monetary policies, it noted that there was no allegation of any specific injury to petitioner's bonds as a result of the claimed illegality in the Committee's composition (Pet. App. 17A) or any allegation that petitioner would benefit in his status as a bondholder by virtue of the removal or presidential appointment of the Reserve Bank members (*id.* at 17A-18A). Distinguishing *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the case chiefly relied on by petitioner and the dissenting judge,[4] the majority pointed out that the plaintiffs there had sought an injunction prohibiting the Federal Election Commission from enforcing the Federal Election Campaign Act so long as its members were improperly appointed, an injunction that, "at least arguably, was of benefit to those plaintiffs who intended to run for office in the 1976 election and whose rights in that campaign would, to a significant degree, be adjudicated by the FEC" (Pet. App. 20A). Here, by contrast, petitioner did not demonstrate a personal stake as a bondholder "so sufficient that he would benefit from a favorable decision on the merits" (*id.* at 19A).

ARGUMENT

The court of appeals correctly held that petitioner lacked standing to challenge the composition of the Federal Open Market Committee. The court's opinion, on which we substantially rely, is fully consistent with the standing principles enunciated in *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), since petitioner failed to allege any specific injury in fact to his legislative or economic interests. Moreover, to the

[4]Chief Judge Wright read *Buckley* to support petitioner's argument that he had standing as a bondholder and therefore had no occasion to consider petitioner's impeachment or legislative power theories (Pet. App. 23A-27A).

extent that petitioner did allege a speculative, generalized injury to his interests as a bondholder—interests shared by millions of members of the general public—he made no attempt to show that these interests would be affected as a result of obtaining the relief he sought. Hence, the dismissal of petitioner's complaint for lack of standing raises no significant legal issue and does not warrant further review.

1. Contrary to petitioner's contention (Pet. 18), there is no conflict between the decision of the court of appeals and *Buckley* v. *Valeo*, 424 U.S. 1 (1976), *Palmore* v. *United States*, 411 U.S. 389 (1973), or *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962). Petitioner incorrectly construes those decisions as holding that the legal composition or authority of a governmental tribunal or body may be challenged in an Article III court by any person who alleges that his interests "can" be adversely affected by the tribunal or body, without any need to show that the relief sought would indeed eliminate or ameliorate a specific injury. Rather, the Court held only that "parties *with sufficient concrete interests at stake* * * * have standing to raise constitutional questions of separation of powers with respect to an agency *designated to adjudicate their rights*." *Buckley* v. *Valeo*, *supra*, 424 U.S. at 12 n.10 (emphasis added).

In *Buckley*, for example, the plaintiffs sought an injunction prohibiting the Federal Election Commission from enforcing the campaign contribution limitations of the Federal Election Campaign Act while its membership was improperly constituted. As the court below noted, that relief arguably would have benefited those plaintiffs who intended to run for office in the 1976 election, who (in effect) would have been relieved of the obligation to comply with the campaign contribution limitations and

other restrictive provisions of the Campaign Act (Pet. App. 20A). Indeed, it is significant that the Court concluded, after a brief discussion of the standing matter, only that "at least some of the [plaintiffs] have a sufficient 'personal stake' to maintain the lawsuit." *Buckley* v. *Valeo*, *supra*, 424 U.S. at 12.

Chief Judge Wright suggests in dissent (Pet. App. 27A) that the plaintiffs in *Buckley* could not have received a benefit from an injunction against continued FEC operations because this Court eventually determined to stay its judgment for 30 days so as not to "interrupt[] enforcement of the provisions the Court sustains." 424 U.S. at 143. But the Court's decision, in the interest of orderly administration of the Campaign Act, to stay temporarily its injunction against future operation of the Commission to allow Congress the time to remedy the constitutional defects was no more relevant to the plaintiffs' standing than a denial of relief on the merits. Standing, of course, depends on the relief *sought* by the plaintiff, not on the relief ultimately granted. "[W]hen a plaintiff's standing is brought into issue the relevant inquiry is whether * * * the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision." *Simon* v. *Eastern Kentucky Welfare Rights Organization*, *supra*, 426 U.S. at 38. The plaintiffs in *Buckley* requested a permanent injunction against enforcement of the Act by the Commission,[5] and that relief unquestionably would have been of substantial, concrete benefit to them.

Palmore and *Glidden* also illustrate the requirement that a litigant must personally benefit, even if only temporarily, from the relief sought. Palmore, a defendant

[5]If Congress had chosen not to reestablish the Commission in accordance with the Court's opinion, that indeed would have been the relief ultimately obtained.

convicted of a felony by the Superior Court of the District of Columbia, challenged his conviction on the ground that the Superior Court, which was not created under Article III of the Constitution, lacked the legal power to try him. His standing to raise this issue was clear, for acceptance of his argument would have required a reversal of his conviction, even if it may have led to a new trial later before a competent tribunal. Similarly, in *Glidden* a company that had lost an appeal before a divided panel of the court of appeals argued in this Court that the judge who cast the deciding vote and wrote the court's opinion had not been appointed pursuant to Article III and thus was not empowered to hear the appeal. Again, had this Court agreed with that contention, it would have granted the relief sought, *i.e.*, it would have reversed the court of appeals' decision and would have remanded for rehearing before a proper panel. The litigant in *Glidden*, as in *Palmore*, would have benefited directly and immediately from the reversal of an adverse decision and a renewed opportunity to obtain a favorable disposition.[6]

As petitioner argues (Pet. 18), there was of course no requirement in *Buckley*, *Palmore* or *Glidden* that the party challenging the composition of the judicial or administrative body establish that he would have obtained more favorable treatment from a legally empowered tribunal or that he was likely to fare better on remand. Each of these parties, however, had an undeniable, important stake in vacating an existing adverse decision that would have deprived him of liberty or property and in receiving another chance to obtain a more satisfactory

[6]In both cases this Court disagreed with the petitioners on the merits and accordingly affirmed.

result (as in *Palmore* and *Glidden*) or in avoiding enforcement of a restrictive statute (as in *Buckley*). Here, in contrast to *Buckley*, *Palmore*, and *Glidden*, petitioner essentially concedes that the judicial relief he seeks (removal or changing the method of selection of the five Reserve Bank members of the Committee) would have no effect on the value of his bonds, much less that such relief would be likely to enhance their value. In sum, petitioner shares "only the generalized interest of all citizens in constitutional governance." *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 217 (1974).

2. The court of appeals also correctly held that petitioner lacked standing as a legislator to challenge the Committee's composition. The statute providing for service on the Committee by five representatives of the Reserve Banks certainly does not limit the impeachment power of the House of Representatives, and petitioner is free to initiate impeachment proceedings against Committee members at any appropriate time.[7] Petitioner has suggested only a theoretical impediment to possible impeachment—that the House would conclude, if a case ever were to arise, that "de facto officers are jurisdictionally beyond the reach of that power" (Pet. 12). He has made no showing either that he is currently being frustrated from exercising his power to initiate impeachment of any Reserve Bank members (see note 7, *supra*) or that a judicial declaration about the de facto or de jure status of the members is in fact necessary to secure that power.[8] Thus, as the court below remarked, petitioner's

[7]He would, of course, have to await such time as he has evidence that an impeachable offense has been committed. Petitioner does not contend that he now possesses such evidence.

[8]Even if other members of Congress should decline to approve any attempt by petitioner to secure a vote on a bill of impeachment, that would simply give him a grievance against his fellow legislators. "[N]o supposed impairment of his legislative functions is due, in any part, to the actions or omissions of [respondents]" (Pet. App. 15A).

complaint "is, in actuality, nothing more than 'a request for an advisory opinion in clear violation of Article III limitations' " (Pet. App. 15A). See *Muskrat* v. *United States*, 219 U.S. 346 (1911).

3. Finally, there is nothing to petitioner's claim that the district court ignored genuine issues of material fact respecting his standing as a bondholder and that its dismissal of his complaint for lack of standing therefore "so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this court's power of supervision" (Pet. 19).

Petitioner misconstrues the holding of the courts below. Neither court rejected petitioner's contention that the Committee's activities are capable of influencing the value of his bonds. The courts accepted that allegation but ruled that the relief sought by petitioner would not increase or affect that value.[9] Petitioner has offered

[9]The government's position on this matter is not inconsistent with the affidavits and statements submitted in *Federal Open Market Committee* v. *Merrill*, No. 77-1387. The government has never denied that the Committee's actions are significant to the economy and affect interest rates, although it has argued that various factors other than open market operations also have a major effect on the value of bonds and other financial instruments. By the same token, the government's denial that the Committee votes to increase or decrease "prevailing interest rates" (Pet. 15) was accurate. As we noted in our brief in *Merrill* (pages 8-12), the Committee regularly takes a number of actions that affect the supply of money, but the interest rates that prevail, such as those that govern the value of petitioner's bonds, are set by the market, which the Committee's decisions influence but do not control. Moreover, petitioner's suggestion that the court of appeals' decision was based on a misconception, fostered by the government, concerning the Committee's importance to the economy

nothing to suggest that this conclusion is erroneous. Since that was the question dispositive to petitioner's standing as a bondholder, and since there were no genuine issues of material fact respecting it, the court of appeals correctly affirmed the dismissal of petitioner's complaint. Resolution of the standing issue would not have been aided in any way by the presentation of evidence concerning the general relationship between open market operations and the value of bonds.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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is belied by the court's statement (Pet. App. 3A) that "[t]he most flexible, and perhaps the most important, of these monetary policy tools is the open market instrument."

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No. 78-579

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

HENRY S. REUSS, Petitioner

v.

JOHN J. BALLES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Buckley v. Valeo, 424 U.S. 1 (1976) ---------- 2

Glidden v. Zdanok, 370 U.S. 530 (1962) ------ 2, 3

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Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976)---------- 3

In the Supreme Court of the United States

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1. The Brief for the Respondents in Opposition throws into sharp relief the principal constitutional issue presented by this litigation, which is whether an invasion or impairment of a constitutionally protected interest can, in and of itself, be regarded as such an injury as to give rise to standing to sue. In support of their position that it cannot, respondents have developed a theory that no redress of such an injury can be sought unless the plaintiff can point to some consequential benefit, above and beyond the protection of his constitutional interests as such, which he will receive if the relief sought is granted.

In support of this theory, respondents have advanced an interpretation of *Palmore* and *Glidden* to the effect that the "benefit" which gave rise to standing in those cases was not the vindication of the right to litigate (whether for the first time or the *n*th time) before judges free of constitutional taint, but was instead the opportunity to *re*litigate the cases. (Brief, pp. 6, 7). Whether, *a priori*, this would in fact be a benefit is a professional judgment to be made upon an assessment of the defendant's risk of ultimately facing a more onerous injunction or a more severe sentence. There is not the slightest suggestion by this Court in either *Glidden* or *Palmore* that the result in either case was predicated upon the possibility of obtaining any such chimerical "benefit". To the contrary, the analysis of injury in those cases, while implicit rather than explicit, is perfectly straightforward: the injury claimed is a denial of the litigants' constitutionally protected interest in having the litigation conducted under Article III judges, and that is an injury which, if proven, would be redressed by a holding of this Court requiring that the litigation be conducted before judges appointed in accordance with the Constitution. As this Court observed in *Buckley*, 424 U.S. at 117, the issue of standing exists independently of whether the relief sought is prospective or retrospective. On respondents' relitigation "benefit" theory, prospective relief could never be obtained.

2. Respondents reach the foregoing result through what we respectfully submit is a serious misreading of *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). The injury claimed in that case was reduced availability of subsidized medical care, a very specialized form of economic injury. The holding of the case is, we respectfully submit, that where an economic injury is claimed, the complaint must show on its face that if the relief sought is granted, the injury claimed will be redressed. With all respect, we submit that it is a serious error to read *Simon* as holding that no matter what kind of primary injury is claimed, a consequential economic or other similar loss must be demonstrated in order to confer standing to sue. Yet this is the interpretation presented by the respondents at the very outset of their argument (Brief, p. 4). If that interpretation were valid, then not only did *Simon* overrule *Glidden* and *Palmore*, it would call into question the judicial protections traditionally afforded to the most fundamental constitutional rights, and would call for judicial excursions into questions of causality never before deemed relevant. In short, the respondents' interpretation of *Simon* would validate the worst fears of the most vehement critics of that decision.

3. In the case at bar, the plaintiff cannot seek retrospective relief—that is, some administrative equivalent of relitigation—because the practicalities of the situation preclude it. No matter how much loss a

bondholder may suffer from a past decision of the FOMC, there is no way that such a decision can be retroactively reversed. This is because the implementation of such decisions commences immediately, and there is no way to restore the *status quo ante*. The petitioner is fully prepared to prove that, as a bondholder, he has suffered severe economic losses through past actions of the FOMC.[1] Such proof would seem to be admissible under the pleadings as bearing on the issue of whether the plaintiff has sufficient concrete interests at stake to

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1. Footnote 9 of the Respondents Brief (p. 9) reflects a misunderstanding of the petitioner's position. As a litigant, he is not concerned with the effect, as such, of the FOMC's decisions on the economy as a whole, but rather with the effect of such decisions *on him*, an effect which he maintains is radically different under the managed paper standard from what it would have been under the gold standard. On that issue, there remains a sharp conflict between the positions of the petitioner and the respondents. Respondents continue to maintain that the FOMC's decisions are but one influence on the supply and value of money. In their history of the Federal Reserve System presented to the District Court as well as in their brief in the Court of Appeals, respondents ignored the shift from the gold standard to the paper standard. In this Court, they continue to urge that the FOMC's actions merely "affect" the money supply and "influence" interest rates (Brief, p. 9, n. 9). Petitioner has consistently maintained that the FOMC's power is not merely influential, but controlling. The procedural error of which the petitioner complains is the resolution of the issue of control against him without any opportunity to subject the unsupported contrary factual representations made by respondents' counsel to any kind of probative procedures whatsoever.

afford him standing to challenge the defendants' appointments. A recognition that practical considerations preclude retrospective relief strengthens rather than weakens the case for prospective relief.

CONCLUSION

If the respondents' interpretations of *Simon*, *Glidden*, and *Palmore* had been offered by private counsel, they might be regarded as of little consequence. They were not, and they are not. The fact that the Solicitor General of the United States found it necessary to advance such interpretations of those cases in order to defend the judgment of the Court of Appeals in this case argues strongly for granting the writ.

Respectfully submitted,

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November 1978